92-907

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS A. WILKINSON, III
Petitioner,

V.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Under the Federal Income Tax Lien Statutes, does the Government have a right to a lien on property which the delinquent taxpayer has no ownership or interest in?

a) Did the District Court have authority (under the same lien statutes) to use equity power to hold Petitioner's property in trust to pay the delinquent taxes of the former owner?

b) Where the Petitioner obtained title to the real property in question by and through a State Court decree, did the District Court have the authority to question the State Court decree?

(c) Did the District Court err when it refused to recognize the State Court decree under the doctrine of full faith and credit?

d) Where the taxpayer had been declared incompetent, had a State appointed Guardian, and he and his property were in custodia legis, could the property in question have been fraudulently conveyed?

e) Assuming the property was fraudulently conveyed and under the law of North Carolina the conveyance was good between the parties and legal title was vested in Petitioner, could the Government lien attach?

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JURISDICTIONAL GROUNDS FOR THE SUPREME COURT, CONSTITUTIONAL PROVISIONS AND PERTINENT STATUTES INVOLVED

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment in this case on August 7, 1992. (No. 91-1795, Unpublished). The statutory provision believed to confer jurisdiction on this Court is 28 USCA Sec. 1254.

CONSTITUTIONAL PROVISIONS

ARTICLE IV.--RELATIONS BETWEEN STATES

Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

STATUTES INVOLVED

26 USCA Sec. 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 USCA Sec. 6322. Period of lien

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

26 USCA Sec. 6323 (Full text, pA62 Appendices)

28 USCA Sec. 1738 (Full text, pA75 Appendices)

28 USCA Sec. 2410 Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title (28 USCA Sec. 1444) for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter--

(1) to quiet title to,

...

real or personal property on which the United States has or claims a mortgage or other lien.

...

(Full text, pA75 Appendices)

NCGS Sec. 44-68.10; 68.11; 68.12 (Full text, pA74 Appendices)

NCGS Sec. 39-15 (Full text, pA78 Appendices)

NCGS Sec. 35A-1251 (Full text, pA79 Appendices)

STATEMENT OF THE CASE

The Petitioner brought this action in Mecklenburg County, North Carolina, Superior Court, pursuant to 28 USCA Sec. 2410 to remove a tax lien placed on real property he owns at 1215 Carey Court, Charlotte, Mecklenburg County, North Carolina. The tax lien was for delinquent taxes owed by the former owner, the Petitioner's incompetent father. The case was removed by the Government on July 31, 1989, to the United States District Court for the Western District of North Carolina.

After the Government filed answer, the Petitioner moved for summary judgment on February 14, 1990. The District Court filed an order on July 6, 1990 (published as 741 F. Supp. 517, 1990, pA11 Appendices) denying the motion for summary judgment and held the only issue of material fact was whether the deed issued to Petitioner out of which he received title to the property was void as a fraudulent conveyance.

The case was tried on May 20, 1991, at Charlotte, NC, and on July 30, 1991, the District Court filed its judgment and memorandum of decision. The Court held that the conveyance of the Carey Court property to the Petitioner was fraudulent and "... is void in law as to the United States and is subject to the lien for the tax liability of the taxpayer, Plaintiff's father." (Published as 770 F. Supp. 1085, 1991, pA20 Appendices).

The cause was appealed to the United States Court of Appeals for the Fourth Circuit on September 26, 1991. That Court affirmed the District Court on August 7, 1992, Unpublished No. 91-1795 (pA1 Appendices).

STATEMENT OF FACTS

On April 19, 1988, Thomas A. Wilkinson, III (Petitioner here), settled litigation in Mecklenburg County, N. C., Superior Court. The litigation had arisen out of claims between the State Court appointed Guardian for Thomas A. Wilkinson, Jr. (Petitioner's father) and Petitioner who was acting in his capacity as Executor for his mother's estate. Petitioner's father was incompetent and the settlement of the litigation was entered by the Clerk of Superior Court for Mecklenburg County and approved by a Superior Court Judge. There is no question but that the Court had jurisdiction of the subject

matter and the parties. The Petitioner acquired title to property located in Charlotte, Mecklenburg County, North Carolina, through a quitclaim deed issued through the settlement. The Government thereafter assessed Petitioner's father for delinquent taxes on July 11, 1988. On November 28, 1988, the Government attached Petitioner's property obtained in the aforesaid settlement of April 19, 1988, by filing a lien thereon. (1)

REASONS FOR GRANTING THE WRIT

In the Court below, the District Court was affirmed when it ruled the Internal Revenue Service lien was valid even though the lien is placed on property belonging to Petitioner and not

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(1) The facts stated herein are admitted by the Government in its Answer (pA55 Appendices) or stipulated to by the parties (pA58 Appendices).

the taxpayer. In other words, the courts below have held the Petitioner responsible for paying for the taxes of another -- that the property Petitioner received by and pursuant to a valid in every respect court order is still subject to a lien for taxes owed by the former owner. This, despite the fact that federal lien statutes, which give the authority to place the lien, clearly state the lien attaches only to property which the delinquent taxpayer owns or has an interest in. Under the law of North Carolina, which controls the question of whether the taxpayer has ownership or interest in the property, the taxpayer had no ownership, no interest, nor any hope of the property reverting to him. However, the District Court declared the conveyance from whence the Petitioner received his property void. The District Court had no authority to go beyond the question of whether the taxpayer owned or had any interest in the property; it had no authority to

allow the Government to collaterally attack the State Court judgment; even if it did have authority to go behind the State Court proceedings, there could be no fraudulent conveyance of the property when Petitioner received same under property authority of North Carolina law; there was absolutely no evidence of any fraudulent transfer and the District Court's conclusion of law that the guardian had no intent to defraud precludes any finding of a fraudulent transfer. Finally, even if the conveyance of the property was fraudulent, it is irrelevant because the district court has only authority to determine whether the taxpayer had ownership or any ownerhip interest in the subject property. If there is not property vested in the delinquent taxpayer, there can be no lien; and that under North Carolina law, the Petitioner is still the owner of the property even if it were fraudulently conveyed to him.

The decision by the District Court and sustained by the Fourth Circuit is contrary to U.S. Supreme Court decisions, numerous other Circuit Courts of Appeal decisions and the law of the State of North Carolina. Further, the decision has departed from accepted and usual standards in that the District Court "created" relief for the Government which other creditors would not have if similarly located.

The decision conflicts with the following cases which are applicable:

United States v. Bess, 357 US 51 (1958), which holds state law must define ownership of property and that the taxpayer must have an ownership in such property or an interest/right to the property before the tax lien will attach. Also, see Aquilino v. United States, 363 US 509 (1960); United States v. Durham Lumber Co., 363 US 522 (1960); and Slodov v. United States, 436 US 238 (1978).

Simmons v. Saul, 138 US 439 (1890), holding that once juridiction is established, another state cannot collaterally attack the rendering state's judgment, even for fraud.

Zeddies v. United States, 357 F 2d 897 (7th Circuit)(1966), (cert.den. 360 US 910), holding event if property were conveyed from taxpayer to his wife, the federal lien could not attach because the property was conveyed before the Government's right to a lien came into existence.

City of New York v. United States, 283 F 2d 829 (Second Circiut)(1960), holding a court supervised assignment for benefit of creditors prevent federal tax lien from attaching when assignment was before the rights to a lien for the Government came into existence. Rights of Government can go no higher than taxpayer's.

Midessa Television Co., Inc. v. Motion Pictures for Television, Inc., 290 F 2d 203 (Fifth Circuit)(1961), holding the sole question for review where the rendering state judgment is being attacked is jurisdiction. (Citing Simmons v. Saul, supra).

MacKay v. Pfeil, 827 F 2d 540 (9th Circuit)(1987), holding a Federal District Court has no appellate jurisdiction and cannot serve as a tribunal to review errors of a State Court.

US v. Fidelity & Deposit Co. of Md., et al, 214 F 2d 565 (Fifth Circuit 1954) where husband fraudulently conveyed real property to his wife before the tax lien arose, the Court held there was no property to which a lien could attach since the taxpayer no longer had an interest in the property.

Moore v. Hinnant, 89 NC 461 (1883). There must be intent on the part of the debtor/grantor before there can be a fraudulent conveyance.

Lane v. Becton, 225 NC 457 (1945). Even if there is a fraudulent conveyance of real property, title remains in the grantee. The conveyance is voidable, not void.

I. THE GOVERNMENT MAY PLACE LIEN ONLY ON PROPERTY OWNED BY THE TAXPAYER OR PROPERTY HE HAS AN INTEREST IN.

In this case, a lien could not come into existence until July 11, 1988, when the taxpayer was assessed. The Petitioner had received title to said property on April 19, 1988. Since Sec. 6321, supra, allows a lien only on property in which the taxpayer has an interest at the time the IRS has either assessed or perfected its lien,

then the only question the District Court could inquire into was onwernship of said property. "... the lien statutes create no property rights; instead they merely attach consequences, federally defined, to rights created by state law." Wilkinson v. US, Unpublished, (pA5 Appendices) citing US v. Bess, 357 US 51, 55 (1958). "Thus state law controls the nature and extent of a taxpayer's interest in particular property." Wilkinson v. US, Unpublished, (pA5 Appendices) citing US v. Aquilino, 363 US 512, 13 (1960). The appellate court below seemed to be on track at this point; but it simply did not inquire into the North Carolina law as to ownership. It decided to look into the law of creditors' rights. The District Court confused creditors' rights under the law of North Carolina with the real issue, ownership of the property.

The cases interpreting the lien rights of the Government under the enabling statutes are uniform

in that they determine ownership by and through State law. The District Court in this case did not actually "void" the transaction out of which Petitioner obtained his property. It solved the Government's problem by "creating" an equitable lien on the Petitioner's property. There are a number of cases interpreting whether the Government's lien can attach, but none can be found which supports the District Court here.

In a case concerning an assignment of the taxpayer's property before the United States lien became effective, US v. Lester, 235 F Supp 115, the District Court for the Southern District of New York held the Government cannot enforce its lien where the delinquent taxpayer assigned property before the Government's lien came into existence. The Court held that since the taxpayer had no interest in the property, the lien could not be enforced. "In such case there is nothing to which the lien can attach." Id. @ 119. The

Court held "... creditors' rights and remedies against a taxpayer do not necessarily determine the question of whether the taxpayer has a right or interest in property to which a federal tax lien may attach. The Government's tax lien rights derive and are limited by federal statutes which create them. They are not dependent on what rights the Government as a creditor may be able to avail itself under state statutes." ID. @ 121. The Court went on to state the Governemnt, like any other creditor, might avail itself of Texas law to establish proper requisite to set a fraudulent judgment aside. "But the sections do not affect or propose to affect the validity of the assignment as between the ... parties so as to maintain in the taxpayer ... any right or interest in the assigned property to which the tax lien could attach. (citations omitted). Again, the Government has confused creditors' remedies under state statutes enacted for their benefit with

property rights as between assignor and assignee on which the Government tax lien must depend." Id. @ 122.

The quitclaim deed under which Petitioner received his title was issued by and pursuant to a North Carolina Superior Court decree. The question of title was already answered - a North Carolina court actually vested the Petitioner with his title. As to all the world, the Petitioner is the sole owner of the property. The taxpayer has no interest or any hope of a future interest. The U.S. Supreme Court, in a very similar factual situation, stated: "... a judgment, decree, sentence or order passed by a competent jurisdiction, which creates or changes a title or any interest in an estate, is not only final as to them, but furnishes conclusive evidence to all mankind that the right of interest belongs to the party to whom the court adjudged it." Simmons v.

Saul, 138 US 439, 11 S.Ct. 369, 34 L Ed. 1054, 1061 (1890), (Emphasis added). The only question is "... whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach". US v. Aquilino, 363 US 512, 513, 80 S.Ct. @ 1280. "The import of this is that a federal tax lien can only attach to a property interest of the taxpayer which exists under state law, and if the taxpayer does not own the property or have rights to the property under state law, then the federal tax lien could not attach to such property, thus, the federal tax lien could not tax precedence over a third person's property or right to property in the subject matter of the action." Atlas, Inc. v. US, 459 Fed Supp 1000, 1004 (USDC D.No.Dakota, Southwestern Division).

In Slodov v. US, (1978), 436 US 238, 562 L Ed 2d 251, 98 S.Ct. 1778, (FN #19, 56 L Ed 2d @267) this court noted: "We have held that the extent of

the tax debtor's interest in the property is determined by state law, and that the lien cannot attach when the debtor has no interest." (Emphasis added.

The District Court erred when it proceeded beyond the question of ownership of the property. Under the lien statutes and case law by the Supreme Court, it was required to stop. The Government was an unsecured creditor - the District Court put the Government in a better position than the delinquent taxpayer had.

II. THE DISTRICT COURT EXCEEDED ITS AUTHORITY WHEN IT ALLOWED THE GOVERNMENT TO COLLATERALLY ATTACK THE NORTH CAROLINA JUDGMENT.

The District Court has neither supervisory power nor appellate jurisdiction over the State Court proceedings. The Government below requested

the District Court to, in effect, act as an appellate tribunal to the State Court proceedings. The Court has no authority to do that. See MacKay v. Pfeil, 827 F 2d 540 (9th Cir. 1987). "Federal District Courts, as courts of original jurisdiction may not serve as appellate tribunals to review errors allegedly committed by state courts.", citing Atlantic Coast Line RR v. Brotherhood of Locomotive Engineers, 398 US 281, 296, 90 S.Ct. 1739, 26 L Ed 2d 234 (1970) ("Lower federal courts possess no power whatever to sit in direct review of state court decisions.").

III. FULL FAITH AND CREDIT DEMAND THE DISTRICT COURT RECOGNIZE THE LEGITIMACY OF THE NORTH CAROLINA SUPERIOR COURT DECREE.

The North Carolina decree is not subject to attack in the Federal District Court as was

allowed below. There are many, many cases upholding the doctrine which is required by Article IV, Sec. 1 of the Federal Constitution and mandated by Congress through 28 USCA Sec. 1738. The Fourth Circuit stated as much. Wilkinson v. US, Unpublished, (pA6,7 Appendices). However, it decided the issue under the doctrine of collateral estoppel which has absolutely nothing to do with full faith and credit.

Full faith and credit demands that one state recognize the validity of a judgment rendered in a separate state. Once the rendering court has jurisdiction, its judgment cannot be attacked in another state for fraud. "But waiving everything as to sufficiency of the allegations of fraud, the question arises, Do they furnish any grounds for the annulment by a court of equity ... for the purpose of charging the defendant as trustee for the benefit of the complainants. We think not ...". Simmons v. Saul, supra, 34 L Ed @ 1062.

The Government has obtained exactly the relief below that was denied by the Supreme Court in Saul. The District Court made the Petitioner a trustee for the Government for monies owed by another. This was done by ignoring the fact the taxpayer has no interest in the property and by ignoring the State Court proceedings. It also ignored the lien statute limitations under which the Government gets it lien authority in the first place.

Another pertinent case relative to full faith and credit is Midessa TV Co., Inc. v. Motion Pictures for TV, Inc., 290 F 2d 203 (5th CA 1961). There a suit was brought in Texas District Court to enforce a judgment obtained in New York State. This suit was between the original litigants and probably could have been decided under collateral estoppel, the doctrine incorrecty used by the Fourth Circuit in this case. However, the Court

did use full faith and credit and held that the New York State Court judgment could not be collaterally attacked in the Federal District Court of Texas since the New York Court had jurisdiction. The District Court held the general rule prohibited a collateral attack for fraud where the original court had jurisdiction of the parties and the subject matter. "While a distinction is made between intrinsic and extrinsic fraud (citations omitted) this becomes irrelevant on a collateral attack on a judgment after it is determined that the court had jurisdiction. The matter of jurisdiction is the sole point of inquiry." Id. @ 205 (Emphasis Added).

There has never been any question in this case concerning the jurisdiction of the Superior Court of Mecklenburg County, North Carolins, to render its decision concerning the property in question. Therefore, its decision was not subject to attack in the District Court.

IV. UNDER THE FACTS OF THIS CASE, A FRAUDULENT CONVEYANCE OF THE PROPERTY IN QUESTION WAS NOT POSSIBLE.

It is respectfully submitted that the proceedings under which Petitioner obtained his property could in no manner be attacked as a fraudulent conveyance vehicle.

(1) The District Court concluded as a matter of law the Guardian/Grantor had no intent to defraud.

(2) The incompetent taxpayer had been declared a ward of the State, had a Guardian appointed by the State and he and his property were fully in custodia legis - under the full protection of the Court.

A fraudulent conveyance must have a debtor/grantor who disposes of property with fraudulent intent. Moore v. Hinnant, 89 NC 461

(1883); NCGS Sec. 39-15 (pA8 Appendices); Aman v. Walter, 165 NC 224, 81 SE 162 (1914) (Relied on by the Fourth Circuit in this case. The five principles set out in the decision all relate to conveyances made by the grantor. (pA9 Appendices).

In Moore, supra, it was noted: "The act of parliament (and ours conforms to it) was meant to prevent deeds ... fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors." (P 465). This is the core of fraudulent conveyance. There must be a debtor with intent and property to devise and there must be a conveyance which defrauds creditors. There may be other creditors, but if the grantor conveys "... to discharge an honest debt, it does not fall under the operation of the statute of fraudulent conveyances." Moore, Id. @ 465.

The District Court concluded as a matter of law that the Guardian did not have the necessary fraudulent intent. Even if we disregard the fact that the incompetent taxpayer was under the protection of the State Court, there can be no fraudulent conveyance here. The property was conveyed to settle the ongoing litigation and "discharged an honest debt" (per Moore, supra). In any event, there can be no fraudulent conveyance without a debtor/grantor who has intent. "The intent is the essential and poisonous element in the transaction, and not merely the effect." Moore, supra @ 465. (Original Emphasis).

The taxpayer and his property were in custodia legis when the conveyance was made. There can be no conveyance of the incompetent's property without the approval of the Court. Whether there was fraud in any step of the State

Court proceedings is for that Court to decide. The State Court's decree is the final word on the matter. The Supreme Court held in Broderick's Will, 88 US 21, that where the probate court had jurisdiction of the subject matter and the parties, that the rendering court's judgment could not be attacked on the basis the will was forged and the letters testamentary and order of sale were obtained by fraud, those matters being within the exclusive jurisdiction of the rendering court. Whether fraud was committed on the State Court by the parties in this action cannot be the subject of an attack by the Government in the District Court.

Finally, whether the conveyance was fraudulent is irrelevant. In North Carolina, even if the transfer of real property is fraudulent, title passes to the grantee as between the

parties. It is voidable, not void. Lane v. Becton, 225 NC 457 (1945). The Petitioner still has title to the property. Nothing has been changed in the Mecklenburg County Registry where Petitioner has been the owner of the property since April 19, 1988. The federal lien statute does not permit the lien to be placed on any property other than that owned by the taxpayer. The fact that the property is fraudulently conveyed is no help to the Government relative to its lien. In US v. Fidelity & Deposit Co. of Maryland, et al, 214 F 2d 565 (5th CA 1954) a taxpayer husband fraudulently conveyed real property to his wife before the tax lien arose. The Court held the taxpayer had no property to which the lien could attach. "It is plain from the language of the statute that the tax liens of the U.S. attached to all property and rights to property of the taxpayer at the time the several

assessment lists were received. ... It is equally plain ... that the federal tax liens arose and were recorded long after the taxpayer had conveyed to his wife the property here involved. ... Consequently appellant (Government) did not then acquire a lien on property in which the taxpayer had no interest but only acquired a right to set the conveyance ... aside. Its position was that of an ordinary creditor seeking to recover an unsecured claim. Id. @ 568.

CONCLUSION

The Petitioner's property has been confiscated. The courts below have not addressed the issues raised. He has now run out of legal options.

For the foregoing reasons, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit.

APPENDICES

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

THOMAS A. WILKINSON, III,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 91-1795

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, District Judge.
(CA-89-307-C-C-P)

Argued: March 5, 1992

Decided: August 7, 1992

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and MURRAY, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished opinion. Senior Judge Murray wrote the opinion, in which Chief Judge Ervin and Judge Phillips joined.

COUNSEL

ARGUED: Cecil Martin Curtis, Sr., Charlotte, North Carolina, for Appellant. Randolph L. Hutter, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Shirley D. Peterson, Assistant Attorney General, Gary R. Allen, William S. Estabrook, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

MURRAY, Senior District Judge:

Thomas A. Wilkinson, III, the appellant in this action, filed suit in the Mecklenburg County Superior Court in North Carolina against the United States in an effort to remove a lien placed on real property located at 1215 Carey Court, Charlotte, North Carolina. The matter was removed to the United States District Court for the Western District of North Carolina. After a bench trial, the district court entered judgment in favor of the United States, and Wilkinson filed this appeal. We affirm.

I

Our role in reviewing the district court's findings of fact is limited under Fed. R. Civ. P. 52(a). *Davis v. Food Lion*, 792 F.2d 1274 (4 Cir. 1986). With respect to such findings, the court in Davis noted:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, then we cannot reverse. Likewise we can find no clear error if there are two permissible views of the evidence, and the district court as factfinder chooses one over the other.

Id. at 1277 (citing *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Mindful of that constraint, we note that the facts in this case as found by the district court or as stipulated by the parties, are as follows:

Because of financial difficulties between 1984 and 1986, the appellant's father, Thomas Wilkinson Jr. ("the taxpayer"), failed to pay employment taxes. In the summer of 1986, an officer of the Internal Revenue Service met with the appellant and the taxpayer to discuss the unpaid tax debt. In September 1986, the taxpayer attempted suicide by inhalation of carbon monoxide, an attempt that left him with severe brain damage.

On June 23, 1987, the taxpayer was adjudged incompetent. Six days later, by a general warranty deed, the taxpayer and his wife, Ermine Wilkinson, transferred the Carey Court property, which they held in tenancy by the entireties, to Ermine individually. Valued at approximately $57,000, the Carey Court property was the taxpayer's only significant asset. The taxpayer signed the deed on his own behalf, and the appellant signed the deed as attorney-in-fact for Ermine, who suffered from cancer and apparently could not sign for herself. The deed was recorded on June 30, 1987. On July 1, 1987, Ermine died, leaving all of her property to the appellant, who became executor of her estate.

On October 27, 1987, Edward Connette was appointed guardian for the taxpayer. In that capacity, Connette brought two claims in state court against Ermine's estate; one to set aside the deed dated June 29, 1987, and one to contest Ermine's will. As the executor of Ermine's estate, the appellant answered those claims with several counterclaims against the taxpayer.

Although he did not know about the unpaid tax debt, Connette knew that the taxpayer had several other creditors, whose claims he tried and failed to resolve on a pro-rata basis. Knowing that any recovery from litigation with the appellant would be subject to execution by those creditors, Connette decided to settle the litigation with the appellant. Connette admitted to the district court that the existence of the other creditors had a material impact on his decision to settle. Finding that it served the best interests of the incompetent taxpayer, the Mecklenburg County Superior Court approved the settlement.

In addition to dismissing the pending claims pursuant to the settlement agreement, Connette conveyed the Carey Court property to the appellant by a quitclaim deed dated April 19, 1988. In exchange, the appellant dismissed his own claims against the taxpayer. Also, Ermine's estate paid Connette $10,000 for use toward his costs in administration of the taxpayer's affairs and in the defense of several civil suits against the taxpayer. After paying those expenses, Connette would return any remaining money to the appellant. Finally, the appellant also promised to provide a condominium apartment for the taxpayer in Richmond, Virginia and to pay the taxpayer's living expenses.

On July 11, 1988, based on the taxpayer's unpaid tax debt, the United States assessed taxes against the taxpayer in the amount of $28,920.30. On November 28, 1988, the United States filed a Notice of Tax Lien on the Carey Court property. The appellant brought this action to remove that lien, arguing that the quitclaim deed dated April 19, 1988, transferred ownership of the Carey Court property from the taxpayer to himself.[1] Finding that the deed dated April 19, 1988, was void as a fraudulent conveyance, the district court held that the Carey Court property was properly subject to the tax lien and dismissed the case.

II

If any person neglects or refuses to pay taxes, then the United States may assert a lien in the amount owed "upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. Such liens arise on the date of assessment. 26 U.S.C. § 6322. Congress drafted these lien statutes broadly, with an intent to reach every interest in property that a taxpayer might have. *United States v. National Bank of Commerce*, 472 U.S. 713, 719-20 (1985).

In this case, brought pursuant to 28 U.S.C. § 2410,[2] the appellant argues that the United States cannot assert its lien because the quitclaim deed dated April 19, 1988, transferred all of the taxpayer's interests in the Carey Court property to the appellant. As a result, the appellant argues, the taxpayer no longer had any interest in the Carey Court property on July 11, 1988, the date of assessment. In response,

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[1] The appellant did not contend before the district court and does not contend on appeal that the deed dated June 27, 1987, effected a transfer of any interest in the Carey Court property from the taxpayer to his wife.

[2] Section 2410 provides a limited waiver of sovereignty for sole purpose of quieting title to "real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a). See *Pollock v. United States*, 819 F.2d 144, 145 (6th Cir. 1987).

The United States argues that the deed dated April 19, 1988, is void under North Carolina law as a fraudulent transfer.

By themselves, the lien statutes create no property rights; instead, they merely attach consequences, federally defined, to rights created by state law. *United States v. Bess*, 357 U.S. 51, 55 (1958). Thus, state law controls the nature and extent of a taxpayer's interest in particular property. *Aquilino v. United States*, 363 U.S. 509, 512-1 (1960); *Medaris v. United States*, 884 F.2d 832, 833 (5th Cir. 1989)

III

Because the property at issue in this case is located in North Carolina, the parties agree that the law of that state controls the question whether the taxpayer had any interest in that property at the time of the assessment. The parties further agree that the deed dated June 29, 1987, had no effect; Ermine and the taxpayer held the property as tenants by the entireties until Ermine's death two days later. At that time, the taxpayer became the sole owner of the Carey Court property by right of survivorship. *L & M Gas Co. v. Leggett*, 273 N.C. 547, 551, 161 S.E.2d 23, 26 (1968); *Wooland v. Smith*, 244 N.C. 489, 493, 94 S.E.2d 466, 469 (1956).

If the taxpayer ever transferred his rights in the Carey Court property to the appellant, he did so only by the quitclaim deed dated April 19, 1988. However, concluding that the deed dated April 19, 1988, was void as a fraudulent conveyance, the district court held that the taxpayer retained his interest in the Carey Court property and that the United States properly asserted a tax lien against that property.

The appellant makes three arguments in his appeal of the district court's holding: first, by failing to plead it as an affirmative defense, the United States waived the issue of fraudulent conveyance; second, the district court failed to accord full faith and credit to the approval of the settlement agreement by the Mecklenburg County Superior Court; and third, under North Carolina law and the facts of this case, the deed dated April 19, 1988, was not a fraudulent conveyance.

A

Pursuant to Fed. R. Civ. P. 8(c) a defendant in federal court must plead fraud in the answer as an affirmative defense or risk a waiver of that defense. *Bank Leumi Le-Israel v. Lee*, 928 F.2d 232, 235 (7th Cir. 1991). The appellant in this case argues that, as a defense of confession and avoidance related to fraud, the defense of fraudulent conveyance is encompassed within the requirements of Rule 8(c). *See* 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1271 (1990); *see also Doby v. Lowder*, 72 N.C. App. 22, 27, 324 S.E.2d 26, 29-30 (1984) (recognizing similarity between defenses of fraud and fraudulent conveyance under North Carolina law). Consequently, the appellant argues, the failure of the United States to raise the defense of fraudulent conveyance in its answer should have resulted in a waiver of that defense.

It is well established that waiver does not automatically follow from the failure of a defendant to raise an affirmative defense in answer. "Where the matter is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with Rule 8(c) is not fatal." *Allied Chemical Corp. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983). *Accord Dresser Indus., Inc. v. Pyrrhus AG*, 936 F.2d 921, 928 (7th Cir. 1991); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 334 (7th Cir. 1987). Upon a review of the transcript of the trial held before the district court, we detect no unfair surprise; indeed, the appellant has alleged no such prejudice as a result of the trial.

The United States raised the issue of fraudulent conveyance for the first time in its answer to the appellant's motion for summary judgement. Finding a genuine issue of material fact in connection with the issue of fraudulent conveyance, the district court denied that motion and held a trial on the issue. Without objection, the appellant litigated the issue at the trial before the district court. Accordingly, we conclude that the district court did not err when it allowed the case to proceed to a trial on the merits with regard to the United States' asserted claim of fraudulent conveyance.

B

The judgment of a state court enjoys the same full faith and credit in every other court in the United States, including federal courts,

the judgment would enjoy in the courts of that state. 28 U.S.C § 1728; *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984); *Jones v. Poindexter*, 903 F.2d 1006, 1010 (4th Cir. 1990). The appellant argues that the district court erred by failing accord full faith and credit to the approval by the Mecklenburg County Superior Court of the quitclaim deed as part of the settlement agreement.

In North Carolina, the doctrine of collateral estoppel precludes relitigation of an issue if (I) the issue necessarily was determined in prior action and (2) the parties to the prior action are identical to the parties in the instant case. *State v. Lewis*, 311 N.C. 727, 730, 319 S.E.2d 145, 148 (1984) (criminal conviction for neglect of and refusal to support minor children estopped the defendant from relitigating the issue of paternity as to those children). Because neither element is present in this case, we hold that the district court accorded deference to the judgment of the state court.

In this case, the Mecklenburg County Superior Court held "that the proposed settlement agreement is fair and just to the [taxpayer] that his best interests will be served by this Court's approval same." App. at 62. The state court made no finding with respect to the effect of the settlement agreement on the taxpayer's creditors, and the United States was not a party to the state court proceeding. In its opinion, the district court concluded:

> The validity of the transfer in question does not turn in any way on the validity of the judgment of the North Carolina state court in approving the Settlement Agreement of the lawsuit between the taxpayer and the Plaintiff. That court neither adjudicated the issues present in this case nor the rights of the United States, which was not a party to this action.

App. at 47. For the reasons so stated by the district court, we hold that the state court's approval of the settlement agreement on April 1 1988, did not preclude the district court's holding that the deed date April 19, 1988, was void under North Carolina law as a fraudulent conveyance.

C

Finally, the appellant argues that, under the circumstances of this case, the district court erred when it concluded that the deed dated April 19, 1988, was void as a fraudulent conveyance.

On the topic of fraudulent conveyances, the leading case in North Carolina is *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). In that case, the Supreme Court of North Carolina set out five principles to govern cases in which a party seeks to have a particular conveyance set aside as fraudulent:

> (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors, but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.
>
> (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee, and of which intent he had no notice, it is valid.
>
> (5) If the conveyance is upon a valuable consideration, but made with actual intent to defraud creditors on the part of the grantor, participated in by the grantee, or of which he has notice, it is void.

North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 376-77, 250 S.E.2d 231, 233 (1979) (quoting *Aman*, 165 N.C. at 227-28, 81 S.E. at 164).

In accordance with those five principles, this court first must determine whether the conveyance at issue was "voluntary." A conveyance is deemed voluntary when the grantor receives something less than a reasonably fair price for the property, i.e., where the price paid for the property falls so far below the market value of that property so as to indicate unfair dealing and suggest fraud. *Evans*, 296 N.C. at 378-79, 250 S.E.2d at 234; *Leggett*, 273 N.C. at 549, 161 S.E.2d at 25; *Wurlitzer Distrib. Corp. v. Schofield*, 44 N.C. App. 520, 526, 261 S.E.2d 688, 692 (1980); *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 40 N.C. App. 120, 128, 252 S.E.2d 826, 832 (1979).

In its role as factfinder in this case, the district court valued the taxpayer's dissent against the will between $30,000 and $50,000 and the appellant's counterclaims at $20,000. The district court also found that, under the settlement agreement, the appellant paid $16,400 to Connette for his father's expenses, with additional expenses of approximately $100 per month to supplement the taxpayer's social security benefits. Lastly, the district court found that the Carey Court property had a fair market value of $57,000, encumbered by a $5,000 mortgage. In light of those findings, the district court concluded that the quitclaim deed dated April 19, 1988, was supported by "grossly insufficient" consideration. App. at 43. Having reviewed the record, we find no clear error and thus decline to disturb the district court's finding that the deed dated April 19, 1988, constituted a voluntary conveyance.

After April 19, 1988, the taxpayer retained insufficient assets to pay his debts; indeed, the Carey Court property was his only significant asset. Consequently, the deed dated April 19, 1988, was void as a fraudulent conveyance under the second *Aman* principle. Moreover, the district court specifically found that "the conveyance of the Carey Court Property to Plaintiff was an attempt to hinder creditors," App. at 41, thereby bringing the deed within the scope of the third *Aman* principle. In sum, we hold that, under the circumstances, the deed dated April 19, 1988, constituted a fraudulent conveyance.

D

Finally, the appellant argues that because it did not assess the taxpayer's debt until July 11, 1988, the United States cannot impeach the deed dated April 19, 1988. Under North Carolina law, however, any creditor can attack the validity of a transfer of assets as fraudulent, even if that creditor's claim has not yet been reduced to a judgment. *Everett v. Carolina Mortgage Co.*, 214 N.C. 778, 1 S.E.2d 109 (1939); *Nytco*, 40 N.C. App. at 133, 252 S.E.2d at 834-35. The appellant in this case correctly states that the United States' lien on the Carey Court property did not arise until July 11, 1988. However, because taxpayer liability for unpaid taxes arises when the taxes due, rather than when they are assessed, the United States became creditor to the taxpayer as early as 1986, when the taxpayer and the appellant first met with the IRS concerning the taxpayer's unpaid tax debt. *Teel v. United States*, 529 F.2d 903, 906 (9th Cir. 1976); *Kalb v. United States*, 505 F.2d 506, 509 (2nd Cir. 1974). As one of the taxpayer's creditors at the time of the settlement agreement, the United States could contest the deed dated April 19, 1988, as a fraudulent conveyance.

IV

For the foregoing reasons, the judgment of the district court in this case entering judgment in favor of the United States is

AFFIRMED.

Filed, Charlotte, N.C., 90 July 6
U.S. District Court W. Dist. of N.C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-89-307-P

THOMAS A. WILKINSON, III,
Plaintiff,

V.

UNITED STATES OF AMERICA,
Defendant

ORDER

THIS MATTER is before the Court on Plaintiff Thomas A. Wilkinson, III'S (hereinafter "Plaintiff") motion, filed February 14, 1990, for summary judgment. Defendant, The United States of America (hereinafter "Defendant"), filed a response on March 14, 1990 in opposition to the motion.

I. PROCEDURAL BACKGROUND.

Plaintiff filed a complaint on July 12, 1989 in the Mecklenburg County (North Carolina) Superior Court. The complaint brings an action to quiet the title of property located at 1215 Carey Court, Charlotte, NC 28210 in which Plaintiff holds a quit claim deed. Defendant, through the Internal Revenue Service (hereinafter "IRS"), placed a lien on that property to satisfy the tax deficiency of Plaintiff's father, Thomas A. Wilkinson Jr. (hereinafter "Plaintiff's father"), who lives at the property.

On July 31, 1989, Defendant filed a notice of petition for removal of the action to United States District Court. Defendant is filed an answer to the complaint on September 21, 1989. On November 14, 1989, this Court denied Plaintiff's motion to remand the action back to the Mecklenburg County Superior Court. Thereafter, Plaintiff's motion for summary judgment and Defendant's response to the motion was filed.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT.

Rule 56 of the Federal Rules of Civil Procedure is the applicable Rule pertaining to motions for summary judgment. Rule 56(c) provides that judgment shall be rendered if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Where the only issue to be decided is an issue of law, summary judgment is appropriate. See generally *10A Wright, Miller & Kane, Federal Practice and Procedure*: Civil 2d § 2725, at 79 (West 1983) (hereinafter "Federal Practice"). Naturally, if a genuine issue of material fact exists, the case is not ripe for summary judgment. *Id.* at 89.

The party moving for summary judgment has the burden of showing that no genuine issue of material fact exists, and that he is entitled to judgment as a matter of law. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 381 F.2d 245 (4th Cir. 1967). The burden is heavy, and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. See *Adickes*, 398 U.S. at 157. For example, because the movant carries the burden of persuading the court that his statement of the facts is accurate, if his evidentiary material creates an issue of credibility, the case must go to trial. See *Federal Practice*, at 129.

The movant may not rest on the mere allegations in the pleadings, but must present other materials such as affidavits or deposition testimony. See *Federal Practice*, at 43-44. All favorable inferences that can be drawn from the presented materials is construed in favor of the non-moving party. See *Cole v. Cole*, 632 F.2d 1083, 1090 (4th Cir. 1980).

Although the non-moving party is not required to produce evidence, if the movant makes out a prima facie case that would entitle him to a directed verdict at trial, the burden shifts to the non-moving party to offer some competent evidence that shows there is a material issue of fact at issue. See *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289 (1968). The burden on the non-moving party is not a heavy one; he must only show specific

facts, as opposed to general allegations, that present a genuine issue worthy of trial.

III. FACTUAL BACKGROUND.

The Court's review of the record including the complaint, the answer, and the pleadings related to the motion presently before the Court demonstrates that there are few material issues in dispute. In Defendant's answer, Defendant admits the allegations contained in the complaint either in whole or substantial part in paragraphs 2 through 11, and 13 through 16. Defendant lacks sufficient knowledge as to the correctness of the allegations contained in paragraphs 1 and 12. The only paragraph Defendant completely denies is paragraph 17 which provides, "[T]here is no foundation in fact or law which supports the IRS in placing the lien on the Plaintiff's property". Moreover, in Defendant's reply to the motion for summary judgment, Defendant states, "[T]he United States does not dispute the sequence of events upon which plaintiff relies." See Defendant's Response to Notion for Summary Judgment, at 7.

The undisputed facts can be summarized as follows. After several years of financial trouble from his business, Plaintiff's father unsuccessfully attempted to commit suicide by the means of carbon monoxide poisoning. Thereafter, Plaintiff's father was left with severe brain damage. On June 23, 1987, Plaintiff's father was declared legally incompetent in the Mecklenburg County Superior Court.

On June 29, 1987, a mere six days after being declared incompetent, a general warranty deed was executed by Plaintiff's father which conveyed the Carey Court property solely to his wife, Ermine Wilkinson, thus breaking the tenancy by the entireties. Plaintiff's father signed the deed himself, while Plaintiff signed the deed for his mother pursuant to power of attorney authority. The deed was recorded the next day on June 30, 1987.

Ermine Wilkinson, having suffered with a lengthy cancer illness, died the next day, July 1, 1987. Plaintiff was the sole heir of his mother. Thus, the Carey Court property passed by will to Plaintiff. Plaintiff was named executor of his mother's estate on July 13, 1987.

On October 27, 1987, Edward G. Connette was appointed legal guardian for Plaintiff's father. Thereafter, Connette brought suit in

state court on behalf of Plaintiff's father against Plaintiff to invalidate the June 29, 1987 conveyance of the Carey Court property from Plaintiff's father to Plaintiff's mother on the grounds that Plaintiff's father was legally incompetent at the time he executed the deed.

A settlement between Plaintiff and Connette, approved by the state court, was reached on April 19, 1988. Plaintiff received a quit claim deed in the Carey Court property which was filed with the Mecklenburg County Register of Deeds on April 19, 1988. It is undisputed that when the deed was filed, there was not a federal tax lien on the Carey Court property. Plaintiff's father received from Plaintiff $10,000 in cash to pay for legal fees, and the dismissal of counterclaim in the amount of $20,000 that Plaintiff asserted that he had paid out for his father's expenses and outstanding bills. Additionally, Plaintiff agreed to care for his father for the remainder of his life.

On July 11, 1988, the IRS filed a penalty assessment for back taxes against Plaintiff's father in the amount of $28,920.30 for 1984 through 1986 in connection with employment tax liabilities incurred by Plaintiff father's business. On November 29, 1988, the IRS filed the tax lien on the Carey Court property which is the subject of this action.

IV. LEGAL ANALYSIS.

Plaintiff contends that summary judgment is appropriate because he obtained and filed the deed to the Carey property before the IRS placed a lien on the property. Because North Carolina is a "pure race" jurisdiction, Plaintiff contends that the first person to record has priority. Because Defendant did not put Plaintiff's father on notice of the deficiency until July 11, 1988 (almost three months after the state court-approved settlement) and did not place the lien on the property until November 29, 1988 (more than six months after Plaintiff acquired the property), Plaintiff argues that he is entitled to summary judgment.

Defendant has responded to Plaintiff's motion by raising a fraudulent conveyance defense. According to Defendant, a material issue of fact exists whether Plaintiff's father transferred the property for the purpose of placing the property out of the reach of creditors -- the IRS being such a creditor. Defendant contends that such a conveyance is void under the applicable North Carolina statute.

Thus, the lien is valid against the Carey Court property. Defendant argues that the record contains ample evidence in support of its position, making summary judgment inapplicable in this case. In the alternative, Defendant asserts that Plaintiff holds the property merely as the nominee of his father.

Defendant relies primarily on the deposition testimony of Plaintiff. Although the Court believes Defendant could have presented more evidentiary materials in support of its position, the Court is required by Rule 56 to give every reasonable inference to the nonmoving party. Based on that standard, the Court believes Defendant has presented adequate evidentiary material to support its contention that a material issue of fact exists regarding whether Plaintiff's father made a fraudulent conveyance of the Carey Court property. The Court's rationale for that conclusion is stated below.

The lien in this case was placed on the Carey Court property pursuant to 26 U.S.C. § 6321. That statute provides in pertinent part:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Notice of the lien is required in order to validate the lien. See 26 U.S.C. § 6323. The place for filing a lien on real property is determined by state law. See 26 U.S.C. § 6323 (f). North Carolina has designated the office of the register of deeds of the county where the property is located to be the location for the filing of notice of liens for internal revenue taxes payable to the United States. See N.C. Gen. Stat. § 44-65.

Whether a taxpayer has an interest in property to which a lien can attach is a matter of state law. See *Acquilino v. United States*, 363 U.S. 509 (1960); *United States v. Bess*, 357 U.S. 51 (1959); *United States v. Jones*, 631 F. Supp. 57, 59 (W.D. Mo. 1986). Although the Court in unaware of a specific Fourth Circuit case addressing this issue, numerous other courts have held that state fraudulent conveyance law is controlling in determining whether a lien can attach to a certain piece of property. See *Carr Enterprises, Inc. v. United States*, 698 F.2d 952, 954 (8th Cir. 1983); *United States v. Hickox*, 356 F.2d

969, 972 (5th Cir. 1966); *United States v. Boucher*, 735 F. Supp. 987 (D. Col. 1990); *United States v. Clardson*, 1989 U.S. Dist. LEXIS 15367, at 5 (D.S.C. April 26, 1989); *United States v. Jones*, 631 F. Supp. 57, 59 (W.D. Mo. 1986]; *Noonis v. United States*, 576 F. Supp. 853 (W.D. Tex. 1983).

The applicable North Carolina statute concerning fraudulent conveyances is codified at N.C. Gen. Stat. § 39-15.[1] That statute renders statute renders conveyances with intent to defraud creditors void. In order to have a North Carolina deed voided as a fraudulent conveyance, the following must be shown:

> (1) that the transfers were voluntary, and defendants either (a) did not retain property sufficient to

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[1] For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead (emphasis added).

> pay their debts then existing or (b) made the transfers with the intent to defraud creditors; or (2) that although the transfers were made upon valuable consideration, they were made with the intent to defraud creditors on the part of the grantor, which was participated in by the grantee or of which the grantee had notice.

Wurlitzer Distributing Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688, 691-92 (1980); see also *North Carolina National Bank v. Evans*, 296 N.C. 374, 250 S.E.2d 231, 234 (1979); *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162, 164 (1914); *Nytco Leasing, Inc. v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E.2d 826, 831 (1979).

Courts considering the question of fraudulent transfers have found that determination to be of a factual nature. *Carr Enterprises, Inc.*, 698 F.2d at 954; *United States v. Flores*, 535 F.2d 135, 139 (1st Cir. 1976); *Loving Saviour Church v. United States*, 556 F. Supp. 688, 690 (D.S.D. 1983), *aff'd*, 728 F.2d 1085 (8th Cir. 1986). The determination of whether the transfer was fraudulent under N.C. Gen. Stat. § 39-15 is a matter of fact rather than a matter of law. See *Schofield*, 261 S.E.2d at 692. The fact finder must determine whether the consideration provided for the transfer was adequate[2], whether the transfer was made with the intent to defraud creditors, or in the case of transfer made with valuable consideration, whether that transfer was made with intent to defraud creditors.

In the case at hand, Defendant has introduced evidence that indicates Plaintiff's father had numerous creditors at the time of the

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[2]A valuable consideration in the law of fraudulent conveyances is not the same as a valuable consideration in the law of contracts. See *Evans*, 250 S.E.2d at 234. For purposes of fraudulent conveyance law, a conveyance is deemed to be voluntary "when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud". *Id.* (citing *Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968)). The determination of a "reasonably fair price" is obviously a question of fact.

transfer of the Carey Court property. See *Transcript of Deposition of Thomas A. Wilkinson III*, January 5, 1990, at 11 (hereinafter "Plaintiff's Dep."). Moreover, Plaintiff was aware that his father owed money to the IRS. *Plaintiff's Dep.* at 42. In fact, Plaintiff contacted the IRS after the business was shut down in order to attempt to reach some sort of settlement regarding the monies owed to the IRS. *Plaintiff's Dep.* at 51. Plaintiff was also aware that obligations owed to the IRS take precedent over other obligations. *Plaintiff's Dep.* at 54. Therefore, the Court believes that there is a material issue of fact in dispute regarding whether Plaintiff entered into the settlement agreement with his father's guardian in order to avoid creditors; namely the IRS. See also *Plaintiff's Dep.* at 20-21 (indicating Plaintiff's father was rendered insolvent following transfer of Carey Court property).

The Court also believes a material issue of fact exists concerning whether adequate consideration was paid for the property. Plaintiff indicated the property was worth at least $57,000, subject to a small mortgage. *Plaintiff's Dep.* at 15. In return for receiving the property, Plaintiff agreed to pay $10,000 to Connette on behalf of Plaintiff's father, to drop two $10,000 claims against his father, and to support him for the rest of his life. *Plaintiff's Dep.* at 31-34. Whether or not this amount was a reasonable sum is a question for the fact finder.

In summary, the Court believes that a material issue of fact exists regarding whether the transfer was fraudulent. Accordingly, summary judgment is not appropriate. Nonetheless, the Court believes that there are few issues in dispute and would urge the parties to enter into stipulations regarding those undisputed factual issues. The Court believes the only material issue left for disposition concerns whether the conveyance was fraudulent. Because the Court believes a material issue of fact exists regarding the fraudulent conveyance defense raised by Defendant, the Court does not believe it is necessary to address Defendant's alternative position that Plaintiff holds the property merely as the nominee of his father.

V. ORDER.

NOW, THEREFORE, IT IS-ORDERED that Plaintiff's motion for summary judgment be, and hereby is, DENIED.

This the 6th day of July, 1990.

S/S

ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT COURT JUDGE

Filed, Charlotte, N.C., 91 July 30 PM 2:15
U.S. District Court W. Dist. of N.C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

C-C-89-307-P

THOMAS A. WILKINSON, III,
Plaintiff,

V.

UNITED STATES OF AMERICA,
Defendant

} MEMORANDUM OF DECISION

THIS MATTER came on for hearing before the undersigned on May 20, 1991 at Charlotte, North Carolina. Cecil M. Curtis, Esquire, represented the Plaintiff and Jon D. Pifer, Trial Attorney, Tax Division, U.S. Department of Justice, represented the Defendant.

FINDINGS OF FACT

1. Thomas A. Wilkinson, Jr., [hereinafter "taxpayer"], father of the Plaintiff in action, operated a business identified as Realty Maintenance Services, Inc., a North Carolina Corporation, [hereinafter "RMS"] which during the years 1984 through 1986 experienced financial difficulties. The taxpayer was Vice President of RMS during those years and ran its day-to-day affairs. Defendant's Exhibit [hereinafter "DX' or "GX'] 9 was executed by the taxpayer indicating he was also a Director of RMS. (Stipulation of Fact [hereinafter "SF"] No. 4).

2. During the years 1984 through 1986, RMS withheld taxes from the wages of its employees, but failed to remit the withheld taxes to the Defendant. [GX 7, 10].

3. The Property at 1215 Carey Court [hereinafter "the Carey Court Property"] was held by the taxpayer and his wife Ermine W. Wilkinson [hereinafter "Ermine"] as tenants by

the entireties prior to June 29, 1987. [SF 8]. On June 29, 1987, the taxpayer, together with his wife Ermine, by her attorney-in-fact, the Plaintiff in action, executed a deed from she and the taxpayer to convey the property to Ermine individually, which was presented to the Register of Deeds for Mecklenburg County on June 30, 1987, and recorded in Book 5538 at Page 152 in that office. [GX 1; SF Nos. 8 and 9]. The house was worth approximately $57,000 on that date (Transcript of Trial Testimony [hereinafter "Tr."] 39). The Plaintiff knew his father, the taxpayer, did not have any assets except the Carey Court Property on June 29, 1987 [Tr. 48-49].

4. Ermine died July 1, 1987, leaving a Will dated March 12, 1987 devising and bequeathing all of her property, which included the Carey Court Property, to Thomas Albert Wilkinson, III, the Plaintiff in this action. On July 13, 1987, Plaintiff was appointed Executor of her Will. [SF Nos. 10 and 11; GX Nos. 2 and 4].

5. The taxpayer attempted to commit suicide in September of 1986. He survived the attempt, but was left severely brain damaged. The taxpayer was adjudged incompetent on June 23, 1987. (Plaintiff's Exhibit, [hereinafter "PX"] 1; SF 6,7).

6. On October 27, 1987, Edward G. Connette qualified as legal Guardian for the taxpayer, and the taxpayer, through his Guardian, dissented from the Will of Ermine and brought suit in state court against Thomas A. Wilkinson, III, the Plaintiff in this action, as sole beneficiary of Ermine's Will and as executor of her Will. The action sought to set aside the June 29, 1987 deed on the grounds that the taxpayer had been declared legally incompetent on June 23, 1987, six days prior to executing the deed to Ermine. [SF Nos. 6, 7, and 12].

7. The Plaintiff in this action counterclaimed and alleged that the taxpayer had forged the name of the Testatrix on a Deed of Trust for the Carey Court Property, pledged stocks belonging to her as collateral for a loan, and that the conveyance of the Carey Court Property to her on

June 29, 1987 was to fulfill a promise by the taxpayer to convey his interest in the Carey Court Property to her as compensation for the alleged damage to her. [Deposition GX 6; SF 13].

8. On December 10, 1987, the taxpayer was notified by the IRS that it proposed to assess a penalty against him for the total amount of employment tax withheld from the employees of RMS for the years 1984 through 1986 and not paid to the Government. [GX 2].

9. On April 19, 1988, there was a Settlement Agreement entered into between the estate of Ermine W. Wilkinson and the Guardian for the taxpayer. [GX 3]. Cecil M. Curtis, Attorney for the Estate of Ermine W. Wilkinson, executed the Agreement on behalf of her estate. Cecil Curtis had also prepared the purported deed recorded on June 30, 1987 in Book 5538 at Page 152, Mecklenburg County Public Registry. [GX 1 and 3].

10. Thereafter, on July 11, 1988, the IRS assessed a penalty, under Section 6672 of the Internal Revenue Code, against the taxpayer. The penalty was assessed for the "trust fund portion" of the delinquent 1984 through 1986 employment tax liabilities of RMS in the total amount of $28,920.30, plus interest. On November 28, 1988, the IRS filed a Notice of Federal Tax Lien on the Carey Court Property, naming the Plaintiff as "nominee, alter-ego, or agent" of the taxpayer. [GX 7; SF Nos. 15 and 16].

11. Pursuant to the Settlement Agreement dated April 19, 1988, the taxpayer's Guardian executed a quit claim deed dated April 19, 1988 and filed in the Office of the Register of Deeds on the same date wherein the Guardian conveyed all the interests of his ward in the Carey Court Property to the Plaintiff. [PX 1, Settlement Agreement Exhibit F].

12. On April 19, 1988, the Guardian was not aware of the outstanding liabilities of RMS or of the taxpayer's own tax liability as a Director and officer of RMS. [SF No. 17].

13. The Plaintiff contends that he owns the Carey Court Property free and clear of the federal tax lien because he became the owner of the Carey Court Property before the tax lien arose and before the tax lien was perfected by filing. The United States claims that the conveyance through which the Plaintiff claims ownership was a fraudulent conveyance and void as to the United States, and that any interest in the Carey Court Property is subject to the tax liability of the taxpayer, Plaintiff's father.

14. The Carey Court Property was essentially the taxpayer's only asset. He had no income other than Social Security at the time of the quit claim deed, and he had no other assets. [Tr. 48].

15. Further, when the Plaintiff executed the June 29, 1987 deed, [GX 1], as attorney-in-fact for his mother, together with his incompetent father, purporting to convey the Carey Court Property to Plaintiff's mother, the Plaintiff's father was insolvent. [Tr. 39].

16. During the years 1984 through 1986 the taxpayer tried to borrow money from Plaintiff from time to time and the taxpayer "owed everyone in the world." [Tr. 25-26].

17. The Plaintiff holds an MBA from Cornell University [Tr. 18] and in 1984-1986 he knew that when employees' withholding taxes were not paid by the employer, that the officers of the employer company were personally liable. [Tr. 21-22].

18. The Plaintiff was aware of the tax debts owed by RMS in at least July of 1986 when he discussed the matter with IRS Agent Hamilton. [Tr. 86, 87].

19. In October of 1986, Plaintiff was aware that the taxpayer owed the IRS $15,000-$20,000, and that it was for withholding taxes, [Tr. 30], and that RMS did not have enough money in its account to pay the tax. [Tr. 31].

20. The Plaintiff requested of Agent Hamilton that the IRS liquidate the assets of RMS, [Tr- 881, which the IRS did, the sale yielding $1,833. Agent Hamilton informed Plaintiff by telephone in January of 1987 that a 100% penalty assess-

ment would be made against the officers of RMS, including the taxpayer for the shortfall. [Tr. 88-89].

21. The Plaintiff testified that his father, the taxpayer, had signed the deed dated June 29, 1987 [GX 1], conveying his interest in the Carey Court Property to Plaintiff's mother, Ermine, after he had been declared incompetent, but that he had "all along" indicated he wished to sign it. [Tr. 41]. The Court has observed the Plaintiff in his testimony, and based upon observation of his demeanor while testifying, his evasive answers, and the circumstances under which the deed was signed, the Court does not find the Plaintiff's testimony to be credible. The Plaintiff had signed the deed two days before his mother's death, as her attorney-in-fact, in an attempt to vest in his mother all interest in the Carey Court Property. The Plaintiff was the sole beneficiary of his mother's will, of which fact the Plaintiff was aware. [Tr. 44].

22. Even though it has been stipulated that the Guardian was not aware of any tax liability by the taxpayer, he was aware that at the time of settlement that there were two lawsuits pending against the taxpayer and another one threatened. The Guardian testified that the existence of other creditors had an impact on his decision to settle the claims in his lawsuit against the Plaintiff in this action, and that the existence of other creditors was material to his decision to settle. [Tr. 71].

23. According to the Guardian it was relevant to his decision in a number of ways. The Guardian testified that through meetings with the creditors an unsuccessful attempt had been made to resolve all the claims on a pro-rata basis. He further testified that his primary concern was the ward, his personal security, food, housing, and health care. He testified that ". . . we felt that if we had actually recovered money in a lump sum, that that money could have been subject to execution by the creditors that we knew of had they prevailed in any civil actions so that the money would not have been available to -- for the future welfare of our client." [Tr. 71-72]. Clearly, the conveyance of the Carey Court Property to Plaintiff was an attempt to hinder creditors, and the Court so finds.

24. The Guardian further testified that he had not known about the IRS claim, that the taxpayer was not able to help him because of his infirmity, and that neither the Plaintiff in this action nor anyone for him had told the Guardian about the tax liability on July 24, 1988, a few months after the settlement agreement. [Tr- 73].

25. Thus, the Plaintiff, in an attempt to have the Carey Court Property conveyed to him free of any tax liens had not told the Guardian about the tax liability which he had been aware of since at least 1986. [Tr. 30]. The Plaintiff was also aware of the taxpayer's personal liability for those taxes. [Tr. 21-22].

26. The Carey Court Property is valued at approximately $57,000 subject to a $5,000.00 mortgage. As of the date of trial, the Plaintiff had paid approximately $16,400.00 to the Guardian on behalf of his father. [Tr. 81].

27. The Plaintiff's mother's estate, of which the Plaintiff was the sole beneficiary, was worth approximately $120,000.00, and would net out to at least $100,000.00 after debts. [Tr. 81, 82].

28. The taxpayer's dissent to Ermine's Will would have been worth about $30,000.00 to $55,000.00. [N.C. Gen. Stat. §§ 30-1; 29-14(b)(2) and Tr. 82]. The settlement agreement [GX 3] provided in essence:

    (a) The Guardian would dismiss the civil action against the Plaintiff in this action to void the deed conveying the Carey Court Property to Ermine. The Plaintiff in this action is the sole beneficiary of her Estate.

    (b) The estate of Thomas A. Wilkinson, Jr. (the taxpayer and husband of Ermine) would withdraw his dissent from Ermine's Will. [GX 3].

    (c) The Estate of Ermine shall pay $10,000.00 to the General Guardian for Thomas A. Wilkinson, Jr., the taxpayer, to pay for costs of Administration and legal expenses, with any surplus to be refunded to the Plaintiff in this action.

(d) The Plaintiff in this action shall provide a condominium in Richmond for Thomas A. Wilkinson, Jr., Plaintiff's father, plus living expense.

(e) The Estate of Ermine will dismiss its counterclaims against the taxpayer in the amount of approximately $20,000.00. [Tr. 82].

(f) The General Guardian of the Estate of the taxpayer will execute a quit claim deed to Thomas A. Wilkinson, III, the Plaintiff in this action.

(g) The Settlement Agreement further recited that Ermine's estate had prevailed in two legal actions to recover securities allegedly used by the taxpayer as collateral for a loan to him and his company. The Estate had also prevailed in a suit to cancel a note and deed of trust on which the taxpayer had allegedly fraudulently signed Ermine's name, and that Ermine had incurred "significant legal fees in that action."

29. The taxpayer in 1988 received approximately $810.00 a month social security and his living expenses were approximately $900.00 a month. [Tr. 68-69].

30. So, in the Settlement Agreement the Plaintiff relinquished unproved counterclaims of $20,000.00, agreed to support the taxpayer at cost of approximately $100.00 a month, paid $10,000.00 to the Guardian from Ermine's estate, and agreed to provide (not convey) a condominium for the taxpayer in Richmond. The Plaintiff has paid $16,400.00 to the Guardian for his father's (the taxpayer) expenses. [Tr. 78].

31. The Plaintiff received the Carey Court Property valued at approximately $57,000.00, less a $5,000.00 mortgage and his mother's estate of approximately $100,000-$125,000.00 free of a dissent claim of a value of $30,000 to $55,000.00.

32. The Plaintiff has provided support for his father because of the Settlement Agreement and because of his moral obligations to the taxpayer, Plaintiff's father. [Tr. 48, 51-52].

33. There is no evidence that the Plaintiff would convey a condominium in Richmond to his father only that he "provide a condominium unit for or apartment for his father." [GX 3, pp. 3 and 4].

34. In any event, the taxpayer, Plaintiff's father, was as of the date of trial living in the Carey Court Property which has been conveyed to the Plaintiff. [Tr. 53].

35. Based on all of the above, the Court finds that there was grossly insufficient consideration for the conveyance by the Guardian of the Carey Court Property to the Plaintiff.

36. This Court has previously considered a motion for summary judgement by the Defendant which was denied, the Court holding that: "In summary, the Court believes that a material issue of fact exists regarding whether the transfer was fraudulent." *Wilkinson v. U.S.*, 741 F. Supp. 577 (W.D.N.C. 1990).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the action instituted by the Plaintiff pursuant to 28 U.S.C. § 1346.

2. A suit under 28 U.S.C. § 2410 is proper only to contest the procedural regularity of a lien; it may not be used to challenge the underlying tax liability or the validity of the tax assessment. *Pollac v. United States* 819 F.2d 144, 145 (6th Cir. 1987); *Aqua Bar & Lounge, Inc. v. United States*, 539 F.2d 935, 939 (3rd Cir. 1976); *Broadwell v. United States*, 343 F.2d 470, 471 (4th Cir. 1965); *cert. denied*, 382 U.S. 825 (1965); see also *Batts v. United States*, 228 F.Supp. 273, 275 (E.D.N.C. 1964).

3. The law requires an employer-corporation to deduct and withhold from the wages of employees, Federal Insurance Contributions Act (FICA) taxes and federal income tax. 26 U.S.C. §§ 3102(a), 3402(a), 3403. The employer is also required to file periodic federal tax deposits with commercial banks designated as depositories by regulation. Treas. Reg. § 31.6302(c)-1. The amount of the tax actually withheld

by employers from employees is held to be "a special fund in trust for the United States." 26 U.S.C. § 7501(a). In the event that the employer fails to pay over these trust fund amounts, and has no assets from which such liabilities can be satisfied, employees are nevertheless entitled to credit for the amount of income and FICA taxes withheld. See e.g., *Slodon v. United States*, 433 U.S 238, 243 , (1978). Section 6672 of the IRC imposes a penalty, equal to "the tax evaded, or not collected, or not accounted for and paid over" on any person who (1) was required "to collect, truthfully account for and pay over" employment taxes and (2) willfully failed to do so. 26 U.S.C. § 6672. In this case, the United States has assessed such a penalty against the taxpayer for the trust fund portion of the unpaid employment taxes of the taxpayer's company, RMS

4. A federal tax lien arises upon assessment and attaches to all property and rights to property belonging to a taxpayer. 26 U.S.C. §§ 6321 and 6322. Here, the federal tax lien arose on July 11, 1988 when the assessment was made against the taxpayer for a penalty pursuant to § 6672 of the IRC. The filing of the Notices of Federal Tax Lien on November 28, 1988 perfected this lien interest against certain creditors of the taxpayer. 26 U.S.C. § 6323. The issue herein is whether the taxpayer had an interest in the subject real property to which the tax lien could attach. The determination of the nature of a property interest, and whether the taxpayer has property to which a tax lien may attach is made according to state law. *Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Bess*, 357 U.S. 51 (1958). "Regardless of when federal taxes are actually assessed, taxes are considered as due and owing, and constitute a liability, as of the date the tax return for the particular period is required to be filed." (Citations omitted) *United States v. Ressler*, 433 F.Supp. 459, 463 (S.D. Fla. 1977), *aff'd* 576 F.2d 650 (5th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

5. The United States may rely on applicable state fraudulent conveyance law if a taxpayer disposes of property prior to the existence of federal tax liens. *Commissioner v. Stern*,

357 U.S. 39, 45 (1958); *United States v. Kaplan*, 277 F.2d 405 (5th Cir. 1960); *United States v. Ressler* 433 F.Supp. 459, 463 (S.D. Fla. 1977). A Notice of Federal Tax Lien, filed against one party as nominee or alter-ego of another, is a valid method for the United States to perfect a lien on property which has been conveyed in order to avoid creditors. *Stophel v. United States*, 81-2 U.S.T.C. ¶ 9669 (E.D. Tenn. 1981); *Baldasari v. United States*, 78-2 U.S.T.C. ¶ 9560 (Cal. Ct. of App. 1978).

6. Under North Carolina law, a conveyance in fraud of creditors is void as to creditors. N.C. Gen. Stat. § 39-15. In the cornerstone case of *Aman v. Walker*, 165 N.C. 224 (1914), the North Carolina Supreme Court set out five circumstances where conveyances are fraudulent and void as to creditors under the North Carolina fraudulent conveyance statute. The facts of this case are square within the second of those circumstances. The second circumstance in *Aman* is:

> . . .if [a] conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property subjected to the payment of creditors generally.

Aman v. Walker, 165 N.C. at 227 (1914).

7. Section 39-17 of the General Statutes of North Carolina provides as follows:

> **§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.**
>
> No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settle prior to such gift or settlement, by reason merely of such indebtedness, *if property, at the time of making such gift*

> *or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler: but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gilt or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.*

N.C. Gen. Stat. § 39-17 (1990) (emphasis added). "A conveyance is voluntary when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 40 N.C. App. 120, 128 (1979).

8. The Plaintiff does not contend that the taxpayer validly conveyed his interest in the subject real property to Ermine Wilkinson through the June 29, 1987 deed. That instrument was ineffective to convey any title to Ermine because the taxpayer was legally incompetent at the time that he signed it. That husband and wife constitute a legal entity separate and distinct from the component parts of the marital status was recognized as early as the Fourteenth Century. It was so declared by the North Carolina Supreme Court as early as 1837 in *Motley v. Whitemore*, 19 N.C. 512 (1837). See also *Woolard v. Smith*, 244 N.C. 489, 492 (1956). Death creates no new estate in the survivor. The survivor takes by reason of the original conveyance. *Underwood v. Ward*, 239 N.C. 513 (1954); *Spruill v. Branning Mfg. Co.*, 130 N.C. 29 (1902). Therefore, since the taxpayer and Ermine were tenants by the entireties of the Carey Court Property on July 1, 1987, the taxpayer as survivor of Ermine became the sole owner by survivorship on that date when Ermine died.

9 The validity of the transfer in question does not turn in any way on the validity of the judgment of the North Carolina state court in approving the Settlement Agreement of the

lawsuit between the taxpayer and the Plaintiff. That court neither adjudicated the issues present in this case nor the rights of the United States, which was not a party to this action.

10. The Plaintiff has proposed that the issue is: Did the taxpayer, Thomas A. Wilkinson, Jr., have an interest in the real property on November 29, 1988 sufficient to enable the Government to attach said property by way of the tax lien filed?

11. The Court disagrees as to the date. As stated above, the law is that a federal tax lien arises upon assessment and attaches to all property and rights to property belonging to a taxpayer.

12. Assessment was made against the taxpayer on July 11, 1988. Therefore, the crucial question is whether the taxpayer owned the Carey Court Property on that date. Since he had been declared incompetent and his Guardian had conveyed the property to the taxpayer's son, the Plaintiff in this action, on April 19, 1988 the answer to the question whether the taxpayer owned the Carey Court Property on July 11, 1988 turns on whether the Guardian's conveyance to the son is void as a fraudulent conveyance or a conveyance to hinder creditors and thus the Property is subject to the tax lien of the United States.

13. The first question to decide is did the Plaintiff purchaser pay a reasonably fair price for the Carey Court Property, such as would indicate fair dealing?

14. The Court has made findings of fact that indicate the consideration paid by the Plaintiff for the Property was grossly inadequate. (See Findings of Fact [hereinafter "FF"] 28, 29, 30, 31, 32, and 33).

15. The next question is whether the Guardian retained sufficient property for the satisfaction of creditors.

16. It has been stipulated that the Guardian was not aware of the tax liability of the taxpayer. However, the taxpayer was insolvent on April 19, 1988, the date of the quit claim deed from the Guardian to the Plaintiff, as well as on June 29,

1987 when the Plaintiff, as attorney-in-fact for his mother, signed together with the taxpayer a deed attempting to convey the Carey Court Property to Ermine, Plaintiff's mother. [FF 14, 15]. The taxpayer had tried to borrow money from Plaintiff from 1984-1986, and he "owed everyone in the world." [FF 16]. The Guardian knew that there were creditors of the taxpayer and the existence of creditors was material to his decision to settle the lawsuit with the Plaintiff and the conveyance of the Carey Court Property to the Plaintiff was a part of that Settlement Agreement. [FF 22, 23, 24, 25].

17. The Plaintiff knew that unpaid employees' withholding taxes were the personal liability of the company officers, of whom his father was one, and the Plaintiff was aware of the tax liability here as early as 1986. [FF 17 and 18]. The Plaintiff knew in October of 1986 of the $15-$20,000 tax liability and that RMS did not have enough money to pay the tax. [FF 19].

18. The Plaintiff was informed by IRS Agent Hamilton in January of 1987 that a 100% penalty would be assessed against the officers of RMS including the taxpayer. [FF 20]. The Guardian was aware there were lawsuits pending against the taxpayer and another one threatened and that those facts had an impact on his decision and the existence of creditors was material to his decision to settle, which included conveyance of the Carey Court Property. [FF 22].

19. The Guardian had not known about the tax liability and neither the Plaintiff nor anyone else had informed him. He found out about it on July 24, 1988. [FF 24].

20. The taxpayer is still living at Carey Court. Clearly, with the conveyance of the Carey Court Property the Guardian intended to delay and hinder creditors. [FF 23]. The taxpayer being indebted to the state of clear insolvency, the Guardian's act of conveying the Carey Court Property hindered the creditors and was void in law, whether done with an intent actually fraudulent or not.

> It is a principle of the common law as old as the law itself, and upon which the preservation of all prop-

> erty depends, that, except so far as the same may be exempt by positive law, the whole of every man's property shall be devoted to the payment of his debts. He cannot gratuitously give away any part of it, the law meaning that he shall be just to his creditors before he is generous to his family. From the fact that he was at the time insolvent, and that his transfer to his daughters was without valuable consideration, it results, as a conclusion of law, that the assignment was void as to his creditors. As said in *Gentry v. Harper*, 55 N.C. 177, it is against conscience for debtors to attempt in any way to withdraw property or effects from the payment of debts; and if the courts of law cannot reach the debtor's interest, a court of equity will.
>
> . . . It is not necessary to show an actual intent to defraud. The transaction is void per se. Revisal, see 962; citing cases.

Michael v. Moore, 157 N.C. 462, 366-367 (1911).

21. The Court finds that the Plaintiff did not pay a reasonably fair price for the Carey Court Property and therefore there is a voluntary conveyance of the Carey Court Property to Plaintiff by the Guardian.

22. Insufficient property was retained by the Guardian to pay the taxpayer's debts including his tax liability.

23. The purpose of the conveyance of the Carey Court Property was to hinder the taxpayer's creditors, including the United States.

24. Finally, the Court wants it clearly understood that the Court does not mean to imply in any way that the Guardian acted with any intent to defraud.

CONCLUSION

The Court concludes that the conveyance of the Carey Court Property by the Guardian of the taxpayer to the taxpayer's son, the

Plaintiff in this action, is void in law as to the United States and is subject to the lien for the tax liability of the taxpayer, Plaintiff's father.

Findings of Fact which may be deemed Conclusions of Law are so seemed and Conclusions of Law that may be deemed Findings of Fact are so deemed.

A Judgment will be filed simultaneously with this Memorandum of Decision.

This the 29th day of July, 1991.

S/S

ROBERT D. POTTER
UNITED STATES DISTRICT COURT JUDGE

Filed, Charlotte, N.C., 91 July 30 PM 2:46
U.S. District Court W. Dist. of N.C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

C-C-89-307-P

THOMAS A. WILKINSON, III,
Plaintiff,

V.

UNITED STATES OF AMERICA,
Defendant

} JUDGEMENT

In accordance with the Memorandum of Decision in this matter, filed simultaneously herewith,

IT IS ORDERED AND ADJUDGED:

1. The Plaintiff will take nothing by his complaint.
2. The interest of the United States in the property at 1215 Carey Court, Charlotte, North Carolina and described in the action is subject to the lien identifying No. 225-07-1445 filed in the office of the Clerk of Superior Court for Mecklenburg County, North Carolina on November 29, 1988, in the amount of $28,920.30, plus all additional penalties, interest, and costs which have accrued.
3. The costs of the action, not to include attorney's fees, shall be assessed against Plaintiff.

This the 29th day of July, 1991.

S/S
ROBERT D. POTTER
UNITED STATES DISTRICT COURT JUDGE

Filed, Charlotte, N.C., _____

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

89-CVS-

THOMAS A. WILKINSON, III,
Plaintiff,

V.

UNITED STATES OF AMERICA,
Defendant

} COMPLAINT

JURISDICTIONAL ALLEGATIONS

1. The Plaintiff is a citizen and resident of Richmond, Virginia.
2. The Plaintiff is the record owner in fee simple of real property located at 1215 Carey Ct., (Carey Ct.), Charlotte, North Carolina.
3. The Defendant, through the Greensboro, North Carolina, office of the Internal Revenue Service (IRS), placed a tax lien on the Carey Ct. property; a copy of which is attached hereto marked exhibit "A."
4. The tax lien was filed at Charlotte, Mecklenburg County, on November 29, 1988. The taxpayer whose liability created the lien is: (Mr. Thomas A. Wilkinson Jr, who lives at 1215 Carey Ct. Charlotte, NC 2821O)
5. This action is brought for the sole purpose of clearing the cloud placed on Plaintiff's title to the Carey Ct. property by the IRS; it is no way intended to contest the validity of the underlying IRS assessment.

6. This action is permitted in the Superior Court of Mecklenburg County and by and through Title 28, Section 2410 USCA, and the subsections thereunder.

OPERATIVE FACTS

7. Thomas A. Wilkinson Jr. is the father of the Plaintiff herein and was declared incompetent by the Superior Court of Mecklenburg County on June 23, 1987. Attached hereto and marked exhibit "B" is a copy of said order.

8. Thereafter on October 27, 1987, Edward G. Connette was qualified as the general guardian of Thomas A. Wilkinson Jr. and letters of guardianship were issued on October 27, 1987. (File No. 87-E-2332, Mecklenburg County).

9. On November 2, 1987, the guardian brought suit against Thomas A. Wilkinson III, the Plaintiff herein, in his capacity as Executor of the last will of Ermine W. Wilkinson, deceased, and as sole beneficiary under the will of Ermine W. Wilkinson, seeking to have declared void a deed which was recorded on June 30, 1987, in the Mecklenburg County Public Registry.

10. The deed referred to in paragraph 9 above was executed by the Ward, Thomas A. Wilkinson Jr. (Ward) on June 29, 1987, after he had been declared incompetent.

11. Thereafter, Plaintiff filed an answer, amended answer and counter claim on behalf of the deceased, Ermine W. Wilkinson (Testate), alleging various acts of fraud and deceit committed on Testate by Ward before be became incompetent, causing Testate substantial damages.

12. Thereafter, the Guardian, on January 12, 1988, dissented from the will of Ermine Wilkinson, deceased, on the grounds that said will totally excluded ward from benefits therein.

13. Thereafter, on April 19, 1988, the Plaintiff and the Guardian did settle all their differences and the same was approved by the Clerk of Superior Court and affirmed by the Honorable Kenneth Griffin, resident Superior Court Judge for Mecklenburg County. Attached hereto and incorporated herein

are the following exhibits: Exhibit "C" is the settlement agreement; Exhibit "D" approval of settlement of litigation and other matters between Guardian and Executor by Cynthia L. Williams, assistant Clerk of Superior Court; and Exhibit, "E" order of confirmation of settlement of litigation and other matters between Guardian and Executor by Honorable Kenneth Griffin, resident Superior Court Judge.

14. As part and parcel of the agreement set forth above, the Guardian executed a quit-claim deed in favor of the Plaintiff for the Carey Ct. property. (Attached hereto marked exhibit "F" is a copy of said deed.)

15. On July 11, 1988, the IRS assessed the Ward with a tax deficiency of $28,920.30. Attached hereto marked exhibit "G" is a copy of said assessment.

16. The tax lien (paragraphs 3 and 4, exhibit "A") is in place on the Mecklenburg County Public Registry and acts as a cloud and prevents Plaintiff from selling or otherwise alienating the property without subjecting the same to the lien.

17. There is no foundation in fact or law which supports the IRS in placing the lien on the Plaintiff's property.

WHEREFORE, the Plaintiff herein prays that the court issue an order dissolving the lien and clearing title to Plaintiff's property; that the Defendant be assessed reasonable attorney's fees; and that the Defendant be taxed with the costs of this court; and for any other relief which the court deems just and proper.

This 11 day of July, 1989.

S/S

CECIL M. CURTIS
Attorney for Plaintiff
P.O. Box 36548
Charlotte, NC 28236-6548
704/377-9371

(Rev. July 1967) **Notice of Federal Tax Lien Under Internal Revenue Laws**

(52)

District	Serial Number	For Optional Use by Recording Office
Greensboro		

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

FILED
1988 NOV 29 PM 3:00
MECKLENBURG CO., N.C.
BY

Name of taxpayer

Thomas A. Wilkinson, III, as Nominee, Alter Ego, or Agent of Thomas A. Wilkinson, Jr.

Residence

1215 Carey Court
Charlotte, NC 28210-2401

IMPORTANT RELEASE INFORMATION–With respect to each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325 (a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
6672	09-30-86	225-07-1445	07-11-88	08-10-94	28,920.30

Place of filing

Clerk of Superior Court
Mecklenburg County
Charlotte, NC 28202

Total $ 28,920.30

This notice was prepared and signed at Charlotte, NC on this,

the 29th day of November 19 88

310-231

Signature

D. W. Bunn

Title

Revenue Officer

(NOTE: Certificate of officer authorized by law to take acknowledgements is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971-2 C.B. 409.)

Form 668 (Rev. 11)

Part 2 – To be signed and returned to the Internal Revenue Service

EXHIBIT "A"

BEST AVAILABLE COPY

Filed, Mecklenburg County, N.C., JUN 23, 1987
Robert M. Blackburn, Clerk of Superior Court

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK

IN THE MATTER OF:

RESPONDENT

THOMAS A. WILKINSON, JR.,
1215 Carey Court
Charlotte, NC 28210

FILE NO: 87-CVS-424

ADJUDICATION OF INCOMPETENCY AND ORDER APPOINTING GUARDIAN

GS 35-1.15, .17, .19

From the petition filed in this matter and from the greater weight of the evidence presented at the hearing: ☒ the jury finds: ☒ That the respondent is an incompetent adult who lacks sufficient capacity to make or communicate important decisions concerning his person, family or property because of: ☒ Mental Illness

Based on the foregoing findings, it is ORDERED that: ☒ the respondent is adjudged to be an incompetent adult.

It is also ORDERED that a: ☒ general guardian be appointed for the incompetent adult, and that letters of guardianship be issued upon qualification and bonding of the guardian as provided by law.

NAME OF GUARDIAN APPOINTED: Ms. Sheldon Grant, Jr.

DATE: 6-13-87 SIGNATURE: S/S (Martha _ Curran), Asst. CSC

Filed, Mecklenburg County, N.C., 88 April 19
By Clerk Of Superior Court

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THOMAS A. WILKINSON, JR., Incompetent, by his guardian, Edward G. Connette, *Plaintiff,* V. HEIRS OF ERMINE W. WILKINSON Deceased; and, THOMAS A WILKINSON, III, as Executor of the Estate of Ermine W. Wilkinson and as Sole Heir under the Will of Ermine W. Wilkinson, *Defendants*	FILE # **87-CVS-13516**
IN RE: ESTATE OF ERMINE W. WILKINSON, DECEASED. DISSENT FROM WILL BY THOMAS A. WILKINSON, JR.	FILE # **87-E-1472**
IN RE: ESTATE OF THOMAS A WILKINSON, JR. INCOMPETENT.	FILE # **87-E-2332**

SETTLEMENT AGREEMENT
STIPULATED FACTS RELATING TO THIS SETTLEMENT

Ermine W. Wilkinson, (Wife/Testate) died testate on July 1, 1987. She named her son, Thomas A. Wilkinson, III, as sole benefi-

ciary and Executor In her Will. He qualified before the Clerk in Mecklenburg County, North Carolina, and Letters Testamentary were issued on July 13, 1987 (87-E-1472). At her death she was married to Thomas A. Wilkinson, Jr. (Husband/Ward), who was adjudged incompetent on June 23, 1987 (87-E-424). Edward G. Connette qualified as general guardian for Ward and Letters of Guardianship were issued on October 27, 1987 (87-E-2332). The general guardian for Ward has Instituted the following procedures in Mecklenburg County Superior Court:

(a) Civil Action file # 87-CVS-13516 seeking to void a deed conveying real property; and

(b) Dissented from the will of the deceased wife, Ermine W. Wilkinson, In file #87-E-1472.

II.

On June 29, 1987, a deed was executed by husband and Wife which purported to vest title solely in Testate. Said deed was filed in Mecklenburg County Public Registry in Book 5538, Page 152. The property was located at 1215 Carey Court, Charlotte, North Carolina. The parties acquired title, as husband and wife, under deed recorded in Book 2508, page 83 of the Mecklenburg County Public Registry. The legal description of said property Is: All of lot 8 of the R. L. Fox property as shown In Map Book 7, Page 449 of the Mecklenburg County Public Registry. Tile City-County tax parcel identification number is 171-121-35 and the present tax valuation is $52,620.00. Said property is subject to a first mortgage of approximately $5,OOO.00.

The value of the personal property of Ermine W. Wilkinson, as shown on the 90-Day Inventory, is $154,000.00. That figure is now reduced to approximately $125,000.00 due to stock market reversals of October, 1987, the years allowance paid to the Ward, and legal fees.

III.

Before Wife's death, she was Plaintiff in two legal proceedings: 86-CVS-10548 and 87-CVS-3439. In 86-CVS-10548 Plaintiff sued First Charlotte Bank to recover securities allegedly wrongfully used by husband to collateralize a loan for himself personally and for a company he owned and operated, Realty Maintenance Corp. In 87-CVS-3439 Plaintiff sued Stockton White & Co. to cancel a note and

deed of trust arising out of an alleged similar fraudulent use of wife's forged signature. In both instances, Plaintiff was successful. Wife incurred significant legal fees in recovering her securities and clearing the title to the property.

IV.

That the Husband allegedly promised Wife prior to September, 1986, that he would join with her in deeding the Carey Court property to her, destroying the estate by the entireties, upon the condition that Wife not sue him for her damages, said damages including, but not limited to, great mental pain, anguish and legal fees expended.

V.

That the Executor has heretofore filed Answer and instituted a counter-claim in Civil Action 87-CVS-13516, alleging estoppel as an affirmative defense and praying for compensatory damages and punitive damages, each in excess of $10.000.00. Defendant's claim has merit and a probability of a very substantial recovery.

VI

Thomas A. Wilkinson, Jr. Is currently residing in the house on Carey Court. He has personal effects and household goods of no great value. He has a fixed income from Social Security. His expenditures have exceeded His receipts since he suffered brain damage from attempted suicide in September, 1986. Thomas A. Wilkinson, III, has voluntarily provided for his father and paid the monthly expenses to the extent that the expenses have exceeded income. He did this consistently from September, 1986, until the general guardian assumed responsibility.

VII.

Thomas A. Wilkinson, Jr. is a Defendant in a number of active civil lawsuits. One civil action is that brought by H. Vernon Norwood, Jr. in civil action file # 87-CVS-11578. In that action, not only the plaintiff seeks money damages against Thomas A. Wilkinson, Jr. but also co-defendants seek money damages against him in crossclaims: First Citizens Bank & Trust Company and also Republic Bank & Trust Company. There is a separate lawsuit which

has been threatened against Thomas A. Wilkinson, Jr. by First Charlotte Bank & Trust. A complaint and summons has not yet been served on the general guardian for Thomas A. Wilkinson, Jr. No personal or financial institution has moved to intervene in either of the estate files or in civil action file # 87-CVS-13516.

VIII

At present time, substantial legal fees have been incurred and more will likely be incurred in the future in the defense of the civil actions against the Ward.

AGREEMENT OF THE PARTIES

Based on the foregoing stipulated facts, the undersigned do hereby AGREE with each other:

1. Estate of Ermine W. Wilkinson, deceased, shall pay $10,000.00 to the general guardian for the benefit and use of Thomas A. Wilkinson, Jr. This money will be held in reserve by the general guardian to pay costs of administration in file # 87-E-2332 and to pay the costs for defending Thomas A. Wilkinson, Jr. in various legal actions. Any surplus funds which are not used for these purposes will be refunded to Thomas A. Wilkinson, III, at the conclusion of all legal proceedings.

2. Thomas A. Wilkinson, III shall provide a condominium unit or apartment for his father in the Richmond, Virginia area and Thomas A. Wilkinson, III will take care of all necessary living expenses for his father for the rest of his father's natural life (the necessary expenses shall include not only the shelter, but also food, medical, clothing, transportation and all other needs). Thomas A. Wilkinson, III shall make these provisions without any expectation for reimbursement from his father or from the estate of his father.

3. The general guardian of the estate shall dismiss his complaint in civil action file # 87-CVS-13516 and the defendant shall dismiss his counterclaims in the same civil action.

4. The dissent from the will of Ermine W. Wilkinson shall be withdraw in file # 87-E-1472.

5. Thomas A. Wilkinson, Jr.'s general guardian shall execute a quitclaim deed conveying and releasing any and all interest which Thomas A. Wilkinson, Jr. may have (if any) in the house and lot located on Carey Court, and this quitclaim deed shall be in favor of Thomas A. Wilkinson, III.

6. Thomas A. Wilkinson, III shall apply to the appropriate court In Richmond, Virginia seeking to administer the estate of Thomas A. Wilkinson, Jr. and shall seek to qualify as the guardian of said estate. As soon as that estate file is established in the appropriate court in Richmond, Virginia, then the general guardian for Thomas A. Wilkinson, Jr. shall seek to conclude the estate before this court in file # 87-E-2332.

7. The parties herein understand that this agreement is subject to approval by the Clerk of Superior Court of Mecklenburg County and subject to further confirmation by a Judge of the Superior Court. All documents referred to in this settlement agreement shall be executed immediately following the confirmation order of said Superior Court Judge.

This 18th day of April, 1988.

WE CONSENT:

S/S

EDWARD G. CONNETTE,
Guardian, for
Thomas A. Wilkinson, Jr.

S/S

DONALD S. GILLESPIE, JR.
Attorney for Guardian

I CONSENT:

S/S

CECIL M. CURTIS,
Attorney for Estate
of Ermine W. Wilkinson

Filed, Mecklenburg County, N.C., 88 April 19
By Clerk Of Superior Court

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THOMAS A. WILKINSON, JR., Incompetent, by his guardian, Edward G. Cornette, *Plaintiff,* V. HEIRS OF ERMINE W. WILKINSON Deceased; and, THOMAS A WILKINSON, III, as Executor of the Estate of Ermine W. Wilkinson and as Sole Heir under the Will of Ermine W. Wilkinson, *Defendants*	FILE # **87-CVS-13516**
IN RE: ESTATE OF ERMINE W. WILKINSON, DECEASED. DISSENT FROM WILL BY THOMAS A. WILKINSON, JR.	FILE # **87-E-1472**
IN RE: ESTATE OF THOMAS A WILKINSON, JR. INCOMPETENT.	FILE # **87-E-2332**

APPROVAL OF SETTLEMENT OF LITIGATION AND OTHER MATTERS BETWEEN GUARDIAN AND EXECUTOR

These matters are before the undersigned Assistant Clerk of Superior Court for approval of a proposed settlement agreement. All

the participants in these court proceedings are properly before the Court and the Court has jurisdiction herein. A Joint request for judicial approval of settlement was filed on March 28, 1988. A notice of hearing before the undersigned Assistant Clerk of Superior Court was filed on March 28, 1988. A hearing before the undersigned was conducted at 10:00 A.M., on April 8, 1988. Appearing at that hearing were Cecil M. Curtis on behalf of Thomas A. Wilkinson, III as Executor of the Estate of Ermine W. Wilkinson and Donald S. Gillespie, Jr., as attorney for Edward G. Connette, General Guardian for Thomas A. Wilkinson, Jr.

The undersigned herein adopts and finds the facts to be those stipulated by the parties in paragraphs I through VIII and incorporates those facts herein; and

The Court further finds that the dissent on behalf of the Ward and attempting to set aside the deed executed on June 29, 1987 are not In the Ward's best interests under the facts and circumstances as they now exist; and

That the best interests of the Ward herein, Thomas A. Wilkinson, Jr. will best be served by approving the settlement put forth by the parties herein. Upon payment of $10,000.00 to the Guardian for the benefit of the incompetent Ward, the Guardian shall dismiss the dissent from the will; dismiss the suit seeking to void the deed previously executed by the Ward and his wife, Ermine W. Wilkinson; and shall issue a quit claim deed releasing any interest the Ward may have, if any, in the property at 1215 Carey Court, Charlotte, North Carolina.

The Court's approval is given this 19th day of April, 1988.

S/S

Cynthia W. Williams
Assistant Clerk of Superior Court

Filed, Mecklenburg County, N.C., 88 April 19
By Clerk Of Superior Court

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

THOMAS A. WILKINSON, JR., Incompetent, by his guardian, Edward G. Connette, *Plaintiff,* V. HEIRS OF ERMINE W. WILKINSON Deceased; and, THOMAS A WILKINSON, III, as Executor of the Estate of Ermine W. Wilkinson and as Sole Heir under the Will of Ermine W. Wilkinson, *Defendants*	FILE # **87-CVS-13516**
IN RE: ESTATE OF ERMINE W. WILKINSON, DECEASED. DISSENT FROM WILL BY THOMAS A. WILKINSON, JR.	FILE # **87-E-1472**
IN RE: ESTATE OF THOMAS A WILKINSON, JR. INCOMPETENT.	FILE # **87-E-2332**

ORDER OF CONFIRMATION OF SETTLEMENT OF LITIGATION AND OTHER MATTERS BETWEEN GUARDIAN AND EXECUTOR

This matter coming on before the undersigned Resident Superior Court Judge in and for Mecklenburg County, North Carolina, on

behalf of the parties hereto, Thomas A. Wilkinson Jr., Incompetent by his Guardian, Edward G. Connette and Thomas A. Wilkinson, III, as Executor of the Estate of Ermine W. Wilkinson and Sole Heir under the Will of Ermine W. Wilkinson, deceased. At Issue before the Court is the proposed settlement agreement, proposing to settle all matters of controversy herein between the parties, including the incompetent Ward's right to dissent from the Last Will and Testament of his wife, Ermine W. Wilkinson, deceased (87-E-1472), and the right to void a deed conveying certain real property (87-CVS-13516), and that certain counterclaim filed in the same action. The settlement agreement has hertofore been approved by the Assistant Clerk of Superior Court of Mecklenburg County.

After reviewing the agreement between the parties, this Court finds that the proposed settlement agreement is fair and just to the Ward and that his best interests will be served by this Court's approval of same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the settlement agreement between the parties be and the same is hereby approved.

This the 19 day of April, 1988.

S/S
Resident Superior Court Judge
Mecklenburg County

Presented for Registration
19 April 1988 4:51 PM
Charles E. Crowder, Register of Deeds
Mecklenburg Co., N.C.

DEED BOOK PAGE 5744 0078

Tax # 171-121-35

Mail to: Cecil M. Curtis, P.O. Box 36548
Charlotte, NC 28236-6548

Drawn by: Donald S. Gillespie, Jr., Gillespie, Lesesne & Connette, 1001 Elizabeth Avenue, Suite 1-D,Charlotte, NC 28204

Brief description for Index: Lot 8 of R. L. Fox Property

NORTH CAROLINA QUIT CLAIM DEED

FEE 10.00, Paid Cash 20:25 #8952 000

THIS DEED made this 19th day of April, 1988, by and between:

GRANTOR: THOMAS A. WILKINSON, JR, Incompetent,
By EDWARD G. CONNETTE, General Guardian
for Thomas A. Wilkinson, Jr., an incompetent adult.

GRANTEE: THOMAS A. WILKINSON, III

WITNESSETH THAT:

WHEREAS, Thomas A. Wilkinson,Jr. was adjudged incompetent by reason of mental illness, in a proceeding before the Clerk of Superior Court of Mecklenburg County (file # 87-SP-424);

WHEREAS, Edward G. Connette has been appointed by the court as General Guardian of Thomas A. Wilkinson, Jr., and he has been duly qualified before the Clerk of Superior Court and Letters of Guardianship issued on October 27, 1987 (file # 87-E-2332);

WHEREAS, Thomas A. Wilkinson, Jr. was married to Ermine Wilkinson (now deceased);

WHEREAS, Thomas A. Wilkinson, Jr. and wife Ermine Wilkinson acquired title to certain real property (described below) under deed recorded in Book 2508, Page 82 of the Mecklenburg Registry;

WHEREAS, a deed was executed on June 29, 1987 and recorded on June 30, 1987, in Book 5538, Page 152 of the Mecklenburg Registry,

DEED BOOK PAGE 5744 0080

which instrument stated that the purpose of the deed was to dissolve the estate by the entireties of Thomas A. Wilkinson and wife and to vest title solely In Ermine Wilkinson;

WHEREAS, Ermine Wilkinson thereafter died, testate, on or about July 1, 1987, and her enstate is being administered before the Clerk of Superior Court of Mecklenburg County (file # 87-E-1472);

WHEREAS, the sole devisee under the will of Ermine Wilkinson is her son, Thomas A, Wilkinson, III so that title to the said property passed under the will of Ermine Wilkinson, effective at the time of her death, to Thomas A. Wilkinson, III;

WHEREAS, the Clerk of Superior Court has approved a settlement agreement between the General Guardian for Thomas A. Wilkinson, Jr., incompetent, and the Estate of Ermine Wilkinson, deceased, and said approval has been confirmed by order of a Judge of the Superior Court of Mecklenburg County;

WHEREAS, pursuant to the said court-approved and confirmed. settlement agreement the General Guardian is permitted to quitclaim and release such interest as the incompetent ward may have (if he has any interest) in the real property, unto Thomas A. Wilkinson, III; and

WHEREAS, the purpose of this quitclaim deed is to make it clear on public record that Thomas A. Wilkinson, Jr. has no ownership interest in and no title to the said property.

NOW, THEREFORE, the Grantor, for valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does release and forever quitclaim unto the Grantee in fee simple, all that certain lot or parcel of land, situated in the City of Charlotte, County of Mecklenburg, State of North Carolina, and more particularly described as follows:

BEING ALL OF LOT 8 OF THE R. L, FOX PROPERTY, AS SHOWN IN MAP BOOK 7, PAGE 449 OF THE MECKLENBURG REGISTRY.

SAID PROPERTY HAS A STREET ADDRESS OF: 1215 CAREY COURT, CHARLOTTE, NC 20210.

TO HAVE AND TO HOLD the above-released and above-quitclaimed premises unto the Grantee; so that neither Grantor nor any person, in his name and behalf, shall or will claim or demand any right or title to the premises, or any part thereof; but the Grantor and any person, in his name and behalf, shall be excluded and forever barred, by these presents.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, the day and year first above written.

DEED BOOK PAGE 5744 0080

THOMAS A. WILKINSON, JR., Incompetent

By:__S/S____
EDWARD G. CONNETTE (SEAL)
General Guardian for Thomas A. Wilkinsont, Jr.,
an incompetent adult

Edward G. Connette
Gillespie, Lesesne & Connette
1001 Elizabeth Avenue, Suite 1-D
Charlotte, NC 28204
(704) 372-5700

STATE OF NORTH CAROLINA, COUNTY OF MECKLENBURG

I, the undersigned notary public for said State and County, certify that Edward G. Connette personally appeared before me on this date and stated under oath that he is General Guardian of Thomas A.

Wilkinson, Jr., an incompetent adult, and Edward G. Connette did, on this date, before me execute the foregoing quitclaim deed. Witness my signature and official seal, on this 19th day of April, 1988.

S/S
Janice M. Addison (Good)
Notary Public
Commission Expires: 7-14-91

State of North Carolina, County of Mecklenburg

The foregoing certicate(s) of Janice M. Addison (Good)

a Notar(y) (ies) Public (is) (are) certified to be correct.
This 19th day of April 1988.
Charles E. Crowder, Register of Deeds
By: Colleen (F) Hough Deputy.

Department of the Treasury
Internal Revenue Service
MEMPHIS, TN 37501

Date of this notice JULY 11, 1988
Taxpayer Identifying Number 225-07-1445
Form: CVL PEN Tax Period: SEP. 30, 1986

For assistance you may call us at:

1-800-541-2228 ST. OF NC

Or you may write to us at the address shown at the left. If you write, be sure to attach the bottom part of this notice.

THOMAS A WILKINSON
THOMAS A WILKINSON
1215 CAREY CT
CHARLOTTE NC 28210-2401

NOTICE OF PENALTY CHARGE

618

YOU HAVE BEEN CHARGED A PENALTY UNDER SECTION 6672 OF THE INTERNAL REVENUE CODE FOR FAILURE TO PAY TRUST FUND TAXES AS A RESPONSIBLE PERSON.

TAX STATEMENT

PRIOR BALANCE	$.00
PENALTY ASSESSMENT	28,920.30
INTEREST CHARGED	.00
BAD CHECK PENALTY	.00
BALANCE DUE	$28,920.30

IRC 6672 PROVIDES THAT A PENALTY EQUAL TO THE AMOUNT OF UNPAID TRUST FUND TAXES CAN BE ASSESSED AGAINST RESPONSIBLE PERSONS WHO FAIL TO COLLECT, ACCOUNT FOR, OR PAY OVER TRUST FUND TAXES.

PLEASE PAY THE AMOUNT SHOWN BELOW. IF YOU DO NOT AGREE WITH THE PENALTY, IRC 6672 PROVIDES AN ADDITIONAL APPEAL. TO REQUEST SUSPENSION OF COLLECTION OF THE 100-PERCENT PENALTY DURING THE ADDITIONAL APPEAL PERIOD; YOU MUST TAKE THE FOLLOWING ACTIONS WITHIN 30 DAYS FROM THE DATE OF THIS NOTICE.

-PAY THE WITHHELD TAX FOR ONE EMPLOYEE FOR ONE QUARTER OF LIABILITY:
-FILE A CLAIM FOR REFUND ON FORM 843, FOR THE AMOUNT PAID: AND
-POST A BOND WITH THE INTERNAL REVENUE SERVICE FOR ONE AND A HALF TIMES THE BALANCE (PENALTY MINUS THE AMOUNT OF PAYMENT MADE).

HOWEVER, IF IT IS DETERMINED THAT THE COLLECTION OF THIS LIABILITY IS IN JEOPARDY, IMMEDIATE COLLECTION ACTION MAY BE TAKEN WITHOUT REGARD TO THE 30 DAYS MENTIONED ABOVE. PAYMENT OF THE AMOUNT OF PENALTY SHOWN BELOW SHOULD BE MADE WITHIN 10 DAYS FROM THE DATE OF THIS NOTICE UNLESS YOU DECIDE TO APPEAL THE PENALTY AS MENTIONED ABOVE.

To make sure that IRS employees give courteous responses and correct information to taxpayers, a second IRS employee sometimes listens in on telephone calls.

Keep this part for your records

Overlay 5 Form 8489 (Rev 11-87)

Return this part to us with your check or inquiry

Your telephone number	Best time to call
( ) -	

AMOUNT YOU OWE.....$28,920.30
LESS PAYMENTS NOT INCLUDED. $_____
PAY ADJUSTED AMOUNT..... $_____

618

225071445 PY 0000 55 0 8609 670 00002892030

COPY

EXHIBIT "G"

INTERNAL REVENUE SERVICE
MEMPHIS, TN 37501

THOMAS A WILKINSON
THOMAS A WILKINSON
1215 CAREY CT
CHARLOTTE NC 28210-2401

240

8826 49254-574-52016-8

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. C-C-89-0307-P

THOMAS A. WILKINSON, III,
Plaintiff,

V.

UNITED STATES OF AMERICA,
Defendant

**Civil No.
C-C-89-0307-P**

ANSWER

COMES NOW the defendant, the United States of America, by and through the United States Attorney for the Western District of North Carolina, and in response to the plaintiff's complaint herein, admits denies and alleges as follows:

1. Lacks knowledge as to the correctness of the allegations contained in paragraph 1 of the Complaint.

2. Admits the allegations contained in paragraph 2 of the Complaint.

3. Admits that the Internal Revenue Service filed a Notice of Federal Tax Lien against the plaintiff as nominee, alter ego, or agent of Thomas A. Wilkinson, Jr., which lien encumbers the Carey Ct. property.

4. Admits that Thomas A. Wilkinson, Jr.'s tax liability is that which is reflected in the lien attached as Exhibit A to the plaintiff's Complaint. Lacks knowledge of Thomas A. Wilkinson,, Jr.'s address.

5. Admits the that this action is to quiet to the property in issue in this case. Admits it is not to contest the validity of any tax assessment. Denies the remaining allegations contained in paragraph 5 of the Complaint.

6. Admits the allegations contained in paragraph 6 of the 'Complaint and further alleges that this action has been properly removed to Federal Court.

7. Admits the allegations contained in paragraph 7 of the Complaint.

8. Admits the allegations contained in paragraph 8 of the Complaint.

9. Admits the allegations contained in paragraph 9 of the Complaint.

10. Admits the allegations contained in paragraph 10 of the Complaint.

11. Admits the allegations contained in paragraph 11 of the Complaint, but denies all allegations contained in the plaintiff's Answer, Amended Answer and Counterclaim not specifically admitted herein.

12. Lacks knowledge as to the correctness of the allegations contained in paragraph 12 of the Complaint.

13. Admits the allegations contained in paragraph 13 of the Complaint, but denies all allegations in the exhibits referred to in paragraph 13 not specifically admitted herein.

14. Admits the allegations contained in paragraph 14 of the Complaint, but denies all allegations contained in Exhibit F not specifically admitted herein.

15. Admits that on July 11, 1988, the United States assessed the plaintiff as nominee, alter ego or agent of Thomas A. Wilkinson, Jr. Alleges that Exhibit 6 is a notice of the penalty tax assessment sent to the plaintiff.

16. Admits the allegations contained In paragraph 16 of the Complaint.

17. Denies the allegations contained in paragraph 17 of the Complaint.

WHEREFORE the defendant prays:

1. That the plaintiff take nothing by his Complaint.

2. That the Court determine that the interest of the United States in the property in issue in this case is superior to that of the plaintiff.

3. That the Court grant the defendant its costs and such other and further relief as it deems proper.

THOMAS J. ASHCRAFT,
United States Attorney

By: S/S
ROBERT L. WELSH
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 272-4512
(FTS) 272-4512

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

C-C-89-307-P

THOMAS A. WILKINSON, III, *Plaintiff,* V. UNITED STATES OF AMERICA, *Defendant*	JUDGEMENT

STIPULATIONS OF FACT

Without waiving the right to object to the relevance of any stipulated fact,, and without waiving the right to offer evidence at trial, the plaintiff Thomas A. Wilkinson, III, and the defendant United States of America, stipulate to the truth of the following:

1. This civil action involves the competing claims of the plaintiff, Thomas A. Wilkinson, III ("the plaintiff") and the defendant, United States of America, ("United States") to certain real property located at 1215 Carey Court, Charlotte, North Carolina ("subject real property").

2. The plaintiff instituted this action pursuant to 28 U.S.C. § 2410, in order to quiet title in himself to the subject real property, free and clear of a federal tax lien in favor of the United States. Specifically, the plaintiff seeks to invalidate or otherwise remove from the subject real property, a federal tax lien, the filed notice of which names the plaintiff as "nominee, alter-ego, or agent" of Thomas A. Wilkinson, Jr., who is the plaintiff's father (Mr. Wilkinson, Jr. will be referred to herein as "the taxpayer") The plaintiff contests only the legal propriety of the tax lien; he does not contest the validity of the underlying tax assessment.

3. The tax lien was filed in connection with certain tax debts assessed against the taxpayer.

4. During the years 1984 through 1986, the taxpayer operated a corporation named Realty Maintenance Services, Inc., ("the company") a corporation doing business in North Carolina. The taxpayer was an officer of the company and essentially ran its day-to-day affairs.

5. The company was essentially a family business, in that during the 1984 to 1986 period, the day-to-day operation of the company was handled by the plaintiff's father and by Henry D. Wilkinson, the taxpayer's son and the plaintiff's brother. For a certain period of time prior to 1980, the plaintiff's mother, Ermine Wilkinson, worked as an employee for the company and kept its books. The plaintiff was not an employee of the company and he did not reside in North Carolina during this time period.

6. Apparently as a result of his financial and other problems, the taxpayer attempted to commit suicide in September of 1986. Although he survived this attempt, he was left severely brain damaged. His present condition is "childlike." He has difficulty with his short-term memory and has no recollection of the events leading up to his suicide attempt.

7. On June 23, 1987, the taxpayer was declared legally incompetent by reason of mental illness, in the Mecklenburg County Superior Court. Incompetency proceedings were commenced by the plaintiff or by Ermine Wilkinson, the plaintiff's mother.

8. Prior to June 29, 1987, the ownership of the subject real property was in a tenancy by the entireties consisting of the taxpayer and his wife, Ermine Wilkinson.

9. On or around June 30, 1987, a general warranty deed ("the June 30, 1987 deed") was executed. Joining as grantors in the deed were the taxpayer and Ermine Wilkinson. Ermine Wilkinson was named as grantee. The taxpayer, although six days earlier had been adjudicated legally incompetent, signed the deed for himself. The plaintiff, signed the deed for his mother, Ermine Wilkinson, as her attorney in fact. Ermine Wilkinson was suffering from cancer and was apparently

too ill to sign for herself.

10. On July 1, 1987, Ermine Wilkinson died. At some point in time prior to above-described conveyance, Ermine Wilkinson changed her will, leaving all her property to the plaintiff.

11. On July 13, 1987, the plaintiff was appointed executor of his mother's estate.

12. On or about October 27, 1987, Edward G. Connette was appointed legal guardian for the taxpayer. Through his guardian, the taxpayer dissented from the will of Ermine Wilkinson, and brought suit in state court against the plaintiff, as sole heir under Ermine Wilkinson's will and as executor of his mother's estate. This action sought to set aside the June 30, 1987 deed on the basis that the taxpayer had been legally incompetent at the time he executed the deed.

13. In response to the legal actions of the taxpayer, the plaintiff made a counterclaim and raised various defenses. It was alleged that in June of 1985 the taxpayer had, without permission, pledged certain stocks belonging to Ermine Wilkinson as collateral for a loan. It was further alleged that in January of 1986, the taxpayer had forged the name of Ermine Wilkinson on a Deed of Trust on the subject real property. It was further alleged that these actions had damaged the estate of Ermine Wilkinson by causing Ermine Wilkinson to incur legal fees and by causing her mental anguish. It was further alleged that the June 30, 1987 deed was in consummation of a promise by the taxpayer to convey his interest in the subject real property as compensation for the damage he had allegedly done.

14. On April 19, 1988, the parties settled this proceeding.

15. On July 11, 1988, the Internal Revenue Service assessed a penalty, under Section 6672 of the Internal Revenue Code, against the taxpayer. The penalty was assessed for the "trust fund portion" of the delinquent 1984 through 1986 employment tax liabilities of Realty Maintenance Services, Inc., in the total amount of $28,920.30, plus interest as provided by law.

16. On November 28, 1988, the Internal Revenue Service filed a Notice of Federal Tax Lien, naming the plaintiff as "nominee, alter ego, or agent" of the taxpayer.

17. The taxpayer's guardian was not aware of the outstanding tax liabilities of the taxpayer's company or of the taxpayer's own tax liability resulting from those outstanding tax liabilities.

18. A suit under 28 U.S.C. § 2410 is proper to adjudicate the rights of third parties in property; it may not be used to challenge the underlying tax liability or the validity of the tax assessment. *Pollac v. United States*, 819 F. 2d 144, 145 (6th Cir. 1987); *Broadwell v. United States*, 343 F. 2d 470, 471 (4th Cir. 1965), *cert. denied*, 382 U.S.. 825 (1965); *Aqua Bar & Lounge, Inc., v. United States*, 539 F. 2d 935, 939 (3rd cir. 1976); see also *Batts v. United States*, 228 F. Supp. 273, 275 (E.D.N.C. 1964).

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§ 6323. Validity and priority against certain persons

(a) Purchases,[1] holders of security interests, mechanic's lienors, and judgment lien creditors. — The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

(b) Protection for certain interests even though notice filed. — Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid

(1) Securities. — With respect to a security (as defined in subsection (h)(4))—

(A) as against a purchaser of such security who at the time of purchase did not have actual notice or knowledge of the existence of such lien; and

(B) as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.

(2) Motor vehicles. — With respect to a motor vehicle (as defined in subsection (h)(3)), as against a purchaser of such motor vehicle, if —

(A) at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B) before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) Personal property purchased at retail. — With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser

intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) Personal property purchased in casual sale. — With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) purchased (not for resale) in a casual sale for less than $250, as against the purchaser, but only if such purchaser does not have actual notice or knowledge (A) of the existence of such lien, or (B) that this sale is one of a series of sales.

(5) Personal property subject to possessory lien. — With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) Real property tax and special assessment liens. — With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of—

> **(A)** a tax of general application levied by any taxing authority based upon the value of such property;
>
> **(B)** a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or
>
> **(C)** charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) Residential property subject to a mechanic's lien for certain repairs and improvements. — With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $1,000.

(8) Attorneys' liens. — With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforceable against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) Certain insurance contracts. — With respect to a life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time—

(A) before such organization had actual notice or knowledge of (the existence of such lien;

(B) after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C) after satisfaction of a levy pursuant to section 6332(b), unless and until the Secretary delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) Passbook loans. — With respect to a savings deposit, share, or other account, evidenced by a passbook, with an institution described in section 581 or 591, to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account and if such institution has been continuously in possession of such passbook from the time the loan is made.

(c) Protection for certain commercial transactions financing agreements, etc. —

(1) In general. — To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has

been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which—

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting—

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) **Commercial transactions financing agreement**. — For purposes of this subsection—

(A) **Definition**. — The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business)—

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) **Limitation on qualified property**. — The term "qualified property", when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial financing security defined. — The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser treated as acquiring security interest. — A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

(3) Real property construction or improvement financing agreement. — For purposes of this subsection—

(A) Definition. — The term "real property construction improvement financing agreement" means an agreement to make cash disbursements to finance—

(i) the construction or improvement of real property

(ii) a contract to construct or improve real property, or

(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) Limitation on qualified property. — The term "qualified property", when used with respect to a real property construction or improvement financing agreement, includes only—

(i) in the case of subparagraph (A)(i), the real property with respect to which the construction or improvement has been or is to be made,

(ii) in the case of subparagraph (A)(ii), the proceeds of the contract described therein, and

(iii) in the case of subparagraph (A)(iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A)(iii).

(4) Obligatory disbursement agreement. — For purposes of this subsection—

(A) Definition. — The term "obligatory disbursement agreement, (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the person other than the taxpayer.

(B) Limitation on qualified property. — The term "qualified property", which used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special rules for surety agreements. — Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person—

(i) the term "qualified property" shall be treated also including the proceeds of the contract the performance of which was ensured, and

(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term "qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract

(d) 45-day period for making disbursements. — Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest—

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(e) **Priority of interest and expenses**. — If the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to—

(1) any interest or carrying charges upon the obligation secured,

(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) the reasonable costs of insuring payment of the obligation secured, and

(6) amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

(f) **Place for filing notice; form**.—

(1) **Place for filing**. — The notice referred to in subsection (a) shall be filed—

(A) **Under State laws**. —

(i) **Real property**. — In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws

of such State, in which the property subject to the lien is situated; and

(ii) Personal property. — In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With clerk of district court. — In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia. — In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien. — For purposes of paragraphs (1) and (4), property shall be deemed to be situated—

(A) Real property. — In the case of real property, at its physical location; or

(B) Personal property. — In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia

(3) Form. — The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of

law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property. — In the case of real property, if —

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens,

then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that reasonable inspection of the index will reveal the existence of the lien.

(5) National filing systems. — The filing of a notice of lien shall be governed solely by this title and shall not be subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system.

(g) Refiling of notice. — For purposes of this section —

(1) General rule. — Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) Place for filing. — A notice of lien refiled during the required refiling period shall be effective only —

(A) if —

(i) such notice of lien is refiled in the office in which the prior notice of lien was filed, and

(ii) in the case of real property, the fact of refiling is entered and recorded in an index to the extent require by subsection (f)(4); and

(B) in any case in which, 90 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary received written information (in the manner prescribed in regulations issued by the Secretary) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) **Required refiling period**. _ In the case of any notice lien, the term "required refiling period" means —

(A) the one year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax and

(B) the one-year period ending with the expiration of years after the close of the preceding required refiling period for such notice of lien.

(4) **Transitional rule**. — Notwithstanding paragraph (3), if the assessment of the tax was made before January 1, 1962, the first required refiling period shall be the calendar year 1967.

(h) **Definitions**. — For purposes of this section and section 6324 —

(1) **Security interest**. — The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at a time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

(2) **Mechanic's lienor**. — The term "mechanic's lienor" means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connec-

tion with the construction or improvement of such property. For purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

(3) Motor vehicle. - The term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(4) Security. — The term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(5) Tax lien filing. — The term "tax lien filing" means the filing of notice (referred to in subsection (a)) of the lien imposed by section 6321.

(6) Purchaser. — The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section and for purposes of section 6324 —

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property,

which is not a lien or security interest shall be treated as an interest in property.

(i) **Special rules**. —

(1) Actual notice or knowledge. — For purposes of this subchapter, an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(2) Subrogation. — Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

(3) Forfeitures. - For purposes of this subchapter, a forfeiture under local law of property seized by a law enforcement agency of a State, county, or other local governmental subdivision shall relate back to the time of seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the State, county, or other local governmental subdivision in the property.

(Aug. 16, 1954, c. 736, 68A Stat. 779; Feb. 26, 1964, Pub.L. 88-272, Title II, § 236(a), (c) (1). 78 Stat. 127, 128; July 5, 1966, Pub.L. 89-493, § 17(a), 80 Stat. 266; Nov. 2, 1966, Pub.L. 89-719, Title I, § 101(a), 80 Stat. 1125; Oct. 4, 1976, Pub.L. 94-455, Title XII, § 1202(h) (2), Title XIX, § 1906(b) (13) (A), Title XX, § 2008(c), 90 Stat. 1688, 1834, 1892; Nov. 6, 1978, Pub.L. 95-600, Title VII, § 702(q) (1), (2), 92 Stat. 2937, 2938; Oct. 22, 1986, Pub.L. 99-514, Title XV, § 1569(a), 100 Stat. 2764; Nov. 10, 1988, Pub.L 100-647 Title I, § 1015(s)(1), 102 Stat. 3573.)

[1]So in original. Probably should be "Purchasers".

ARTICLE 11A.

Uniform Federal Lien Registration Act.

§ 44-68.10. Short title.

This Article may be cited as the Uniform Federal Lien Registration Act. (1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1047, s. 3 made this Article effective August 1, 1990.

Session Laws 1989 (Reg. Sess., 1990), c. 1047 repealed Article 11 of this Chapter, the Uniform Federal Tax Lien Registration Act, and enacted in its place this Article, the Uniform Federal Lien Registration Act. Where appropriate, the historical citations to sections of former Article 11 have been added to the sections of this Article.

§ 44-68.11. Scope.

This Article applies only to federal tax liens, to other federal liens notices of which under any Act of Congress or any regulation adopted pursuant thereto are required or permitted to be filed in the same manner as notices of federal tax liens, and to notices of federal liens upon real property pursuant to 42 U.S.C. § 9607(1). (1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 44-68.12. Place of filing.

(a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with this Article.

(b) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be filed in the office of the clerk of superior court of the county in which the real property subject to the liens is situated.

(c) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the lien applies is a corporation or a partnership whose principal executive office is in this State, as these entities are defined in the internal revenue laws of the United States, in the office of the Secretary of State;

(2) In all other cases, in the office of the clerk of superior court of the county where the person against whose interest the lien applies resides at the time of filing of the notice of lien. (Ex. Sess. 1924, c. 44, § 1; 1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, c. 646, § 1, 62 Stat. 947.)

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title [28 USCS § 1444] for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or cleric employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period

shall be 120 days or the period allowable for redemption under State law, whichever longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k) [12 USCS § 1701k], and subsection (d) of section 1820 of title 38 of the United States Code [38 USCS § 1820], the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954 [26 USCS § 7425], the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be

insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

(June 25, 1948, c. 646, § 1, 62 Stat. 972; May 24, 1949, c. 139, § 119, 63 Stat. 105; July 7, 1958, P. L. 85-508, § 12(h), 72 Stat. 348; June 11, 1960, P. L. 85-507, § 1(20), 74 Stat. 201; Nov. 2, 1966, P. L. 89-719, Title II § 201, 80 Stat. 1147.)

Article 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in

value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (50 Edw. III, c. 6; 13 Eliz. c. 5, s. 2; 1715, c. 7, s. 4; R.C., c. 50, s. 1; Code, s. 1545; 1893, c. 78 Rev., s. 960; C.S., s. 1005.)

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or his estate, or to refuse to complete such contracts, as the guardian determines to be in the ward's best interests, taking into account any cause of action that might be maintained against the ward for failure to complete such contract.

(5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or his estate.

(6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living expenses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or his estate.

(9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.

(10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.

(13) To pay from the ward's estate necessary expenses of administering the ward's estate.

(14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(15) To continue any business or venture or farming operation which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business

(16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bons, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(17) To lease the ward's lands for a term of not more than three years.

(18) To foreclose, as an incident to the collection of any bond note or other obligation, any mortgage, deed or trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or take over without foreclosure.

(19) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian. (1987, c. 550, s. 1.)

Supreme Court, U.S.
FILED
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No. 92-907

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS A. WILKINSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the tax lien of the United States attaches to property that is fraudulently conveyed by the taxpayer to a third party after the responsibility for taxes arose but before the notice of lien is filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) and the opinion of the district court (Pet. App. A20-A34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1992. The petition for a writ of certiorari was filed on November 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the transferee of real property located at 1215 Carey Court, Charlotte, North Carolina (the Carey Court property), and is the son of Thomas A. Wilkinson, Jr., the taxpayer in this case. At the time of the transfer of the Carey Court property, various federal employment taxes for which the the taxpayer was responsible were unpaid, although the taxpayer's liability for those taxes had not then been formally assessed. When that tax liability was thereafter assessed, the United States filed notice of its lien upon "all property and rights to property" (26 U.S.C. 6321) belonging to the taxpayer.

Petitioner filed this suit to quiet title to the Carey Court property, contending that the tax lien did not attach to that property because the property did not belong to the taxpayer at the time the notice of lien was filed. The United States contended that the transfer of that property to petitioner by the taxpayer's guardian[1] was a fraudulent conveyance and that the federal tax lien therefore validly attached to the Carey Court property.

The district court agreed with the United States, finding the transfer of the Carey Court property to be void as a fraudulent conveyance (Pet. App. A4, A20-A34). The court found that the conveyance had been made for "grossly insufficient" consideration (Pet. App. A27), that insufficient property had been retained by taxpayer's guardian following the conveyance to pay taxpayer's creditors (*id.* at A33), and that the conveyance was made for the purpose of hindering taxpayer's creditors (*ibid.*). Applying the tests set forth in *Aman* v. *Walker*, 81 S.E. 162 (N.C. 1914), the court held that the conveyance was

[1] A guardian had been appointed for the taxpayer because, following an attempted suicide, he had suffered severe brain damage and had been declared legally incompetent (Pet. App. A13).

fraudulent under North Carolina law and was therefore "void" as to the United States (Pet. App. A34).[2]

2. The court of appeals affirmed (Pet. App. A1-A10). The court agreed that the transfer of the Carey Court property failed the tests set forth in *Aman* v. *Walker* and was therefore fraudulent under North Carolina law (Pet. App. A8-A9). The court further held that the United States properly could challenge the fraudulent conveyance even though the assessment, and thus the federal lien, arose after the transfer occurred (Pet. App. A10). The court also rejected petitioner's argument that a state court order approving the transfer of the Carey Court property by the taxpayer's guardian to petitioner was denied "full faith and credit" by the district court (Pet. App. A6-A7). The court of appeals held that, since the United States had not participated in the state court proceedings, the United States was not precluded from challenging the conveyance in petitioner's quiet title action (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. A lien for the recovery of federal taxes arises upon the assessment of taxes. 26 U.S.C. 6322. The lien attaches to all property and rights to property belonging to the taxpayer. 26 U.S.C. 6321, 6322. Ordinarily, the tax lien does not attach to property that a taxpayer has

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[2] The district court also found that the transfer of the Carey Court property to Ermine Wilkinson made by taxpayer six days after he was found incompetent was void because of taxpayer's incompetency. Petitioner did not contest the issue in the district court, and he did not challenge the district court's finding on appeal.

validly transferred and no longer owns. When, however, the taxpayer (acting through his guardian in this case) fraudulently disposes of property before the federal tax lien attaches, the United States is entitled—under the same standards applicable to such creditors' claims under state law—to a declaration that the fraudulent conveyance is void. *United States* v. *Ressler*, 433 F. Supp. 459, 463 (S.D. Fla. 1977), aff'd, 576 F.2d 650 (5th Cir. 1978), cert. denied, 440 U.S. 929 (1979). See also *Commissioner* v. *Stern*, 357 U.S. 39 (1958). This reference to state law occurs because, while federal law governs the right of the United States to enforce its tax lien, the determination whether the taxpayer owns "property or rights to property" is a question of state law. See *Aquilino* v. *United States*, 363 U.S. 509, 512-513 (1960). Under North Carolina law, to which reference is made in this case, a conveyance is fraudulent if (i) insufficient consideration was given and the grantor did not retain property sufficient and available to pay his then existing debts, (ii) insufficient consideration was given and the grantor had the intent to hinder or defraud his creditors, or if (iii) the consideration was sufficient, but the grantor had the intent to hinder or defraud his creditors and the grantee had notice of, or participated in, this intent. *Aman* v. *Walker*, 81 S.E. at 164.

The courts below correctly concluded that the conveyance of the Carey Court property to petitioner was fraudulent under the first two tests described above.[3] It was admitted at trial that taxpayer was insolvent at the time the Carey Court property was transferred to petitioner (Pet. App. A23, A31). It was also undisputed, and the district court found, that the conveyance was made for "grossly inadequate" consideration (Pet. App. A31).

[3] The district court and the court of appeals did not apply the third test and we will therefore not address it.

The first of the three alternative North Carolina fraudulent conveyance standards is therefore satisfied in this case.

Moreover, taxpayer's guardian admitted that the existence of taxpayer's many creditors influenced his decision to transfer the Carey Court property to petitioner (Pet. App. A32). Because "the purpose of the conveyance of the Carey Court Property was to hinder the taxpayer's creditors" (Pet. App. A33), the second of the three alternative North Carolina fraudulent conveyance standards is therefore also satisfied.

Petitioner nonetheless claims (Pet. 13-19) that the United States' lien cannot attach to the Carey Court property because the notice of lien was filed *after* the property was transferred and thus at a time when the taxpayer no longer owned the property. The lower courts correctly held, however, that the transfer was void as a fraudulent conveyance (Pet. App. A8-A9, A33). Since the United States became a creditor of the taxpayer *before* the conveyance was made,[4] the United

[4] The unpaid employment taxes for the taxpayer's business were due in 1984, 1985 and 1986. The taxpayer's responsibility for those taxes traces to those dates. See *Kalb* v. *United States*, 505 F.2d 506, 509 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975). See also *Teel* v. *United States*, 529 F.2d 903, 906 (9th Cir. 1976); *United States* v. *Glascock*, 631 F. Supp. 383 (N.D. Ala. 1986), aff'd, 815 F.2d 716 (11th Cir. 1987) (Table); *United States* v. *Edwards*, 572 F. Supp. 1527 (D. Conn. 1983); *In re Serignese*, 214 F. Supp. 917 (D. Conn. 1963), aff'd *sub nom. Goring* v. *United States*, 330 F.2d 960 (2d Cir. 1964). The transfer of the Carey Court property did not occur until 1988 (Pet. App. A31).

Moreover, under North Carolina law, even a person who first becomes a creditor *after* a conveyance is made may challenge it as fraudulent. See *Clement* v. *Cozart*, 17 S.E. 486, 489 (N.C. 1893); Comment, *The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison with the Uniform Fraudulent Conveyances Act*, 50 N.C.L. Rev. 873, 887-888 (1972).

States may (like any other creditor) challenge the transfer as fraudulent under North Carolina law. Pet. App. A10. See *Everett* v. *Carolina Mortgage Co.*, 1 S.E.2d 109 (N.C. 1939).

Petitioner further errs in contending (Pet. 24-26) that the taxpayer's guardian did not act with fraudulent intent. It is true that the district court stated that it did "not mean to imply in any way that the Guardian acted with any intent to defraud" (Pet. App. A33). It also found, however, that "[t]he purpose of the conveyance of the Carey Court Property was to hinder the taxpayer's creditors, including the United States" (*ibid.*). Under North Carolina law, a conveyance is fraudulent if the transferor acted with an intent to hinder or delay creditors *or* an intent to defraud creditors. *Nytco Leasing, Inc.* v. *Southeastern Motels, Inc.*, 252 S.E.2d 826, 833 (N.C. Ct. App. 1979). As the courts below concluded, because the taxpayer's guardian admitted that he sought to keep the Carey Court property out of the hands of taxpayer's creditors, he had the intent necessary for the conveyance to be fraudulent under North Carolina law (Pet. App. A8-A9, A33). In any event, this fact-bound application of state-law principles presents no issue warranting further review.

2. Petitioner argues (Pet. 20-23) that the state court order approving the transfer of the taxpayer's property by his guardian must be accorded full faith and credit by the district court. But the United States was not a party to that guardianship proceeding and is not bound by it. See *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970); see also *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). Moreover, the state court did not consider whether the transfer of the property to petitioner was a fraud on the taxpayer's creditors, for that issue was not raised or considered at that time. The state court proceeding merely considered whether the transfer

proposed by the guardian was "fair and just" to the taxpayer and was in his best interest (Pet. App. A7). The court of appeals therefore correctly held (*ibid.*) that the United States was free to challenge the conveyance as fraudulent in this quiet title action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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